UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHALLENGE MFG. COMPANY, LLC,

Respondent, Case No. 07-CA-199352

and

MICHAEL DANIEL KILISZEWSKI,

Charging Party.

RESPONDENT CHALLENGE MANUFACTURING COMPANY, LLC'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ALJ's PROPOSED FINDINGS AND DECISION

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INTRODUCTION

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- "Then he told me to get the fuck out [of] his face."
- "As I walked away Mike yelled 'Fuck you bitch.'"
- "I feel Mike tries to intimidate me when I ask him for help."
- "I find Mike to be very disrespectful to me…"
- "I am afraid to ask for help…"

These are the words of Norma Sanchez, a female, Hispanic production supervisor at Respondent Challenge Manufacturing ("Challenge"). She wrote them in an email she sent on Saturday, May 6, 2017 to eight Challenge managers and supervisors, including Challenge's nationwide Vice President of Operations, and both the HR and Plant Managers for the facility in which she worked. In her email, she described being subjected to a profane tirade by maintenance technician Mike Kiliszewski in the late hours of May 5, 2017 simply because she told him to fix a broken machine.

Challenge dutifully investigated Ms. Sanchez's complaint, and terminated Mr. Kiliszewski based on its reasonable assessment of all the information obtained in the investigation. What Challenge did not rely on when it made its decision to terminate Mr. Kiliszewski was whether or not Mr. Kiliszewski engaged in union activity during his employment at Challenge, or whether Mr. Kiliszewski supported the UAW, the labor union that was in the process of organizing Challenge's eight manufacturing facilities across the country.

Why not? Because Challenge and the UAW became partners to a broad, nationwide neutrality agreement in May of 2016. Put simply, Challenge lacked any motivation to discriminate against Mr. Kiliszewski for supporting the UAW because Challenge and the UAW had established a mutually-beneficial partnership, pursuant to which Challenge voluntarily extended recognition to the UAW in four of its eight facilities, had successfully ratified four collective bargaining agreements with the UAW, and was in the midst of negotiating another CBA at Challenge's Pontiac, Michigan manufacturing facility when Mr. Kiliszewski was fired

Nevertheless, Mr. Kiliszewski and the General Counsel allege in this case that Challenge terminated Mr. Kiliszewski's employment because of his union activity, or for his general support for the UAW, in violation of Section 8(a)(3) of the National Labor Relations Act. This is untrue for two broad reasons. First, the record is devoid of any evidence that Challenge took any action to discourage membership in the UAW, and thus the General Counsel failed to prove the required element of union animus in this case. Second, Challenge successfully carried its own evidentiary burden by proving that it would have terminated Mr. Kiliszewski's employment even absent his support for the UAW. Based on Challenge's reasonable beliefs about what occurred on May 5, 2017 after it evaluated all the evidence, Challenge would never have retained any employee who behaved as egregiously in demeaning a Hispanic, female supervisor on the shop floor in front of all her co-workers. Mr. Kiliszewski's conduct made Ms. Sanchez feel "afraid" and "intimidate[d]," and that conduct is utterly unacceptable in any modern workplace. The Board should dismiss Mr. Kiliszewski's Section 8(a)(1) and (3) claims against Challenge in full and with prejudice.

STATEMENT OF THE CASE

In his recommended opinion, the ALJ held that Challenge violated Sections 8(a)(1) and 8(a)(3) of the Act when it terminated Mr. Kiliszewski. The ALJ is incorrect for two

broad reasons, and the Board should decline to adopt the ALJ's recommended opinion and dimiss Mr. Kiliszewski's charges instead. The ALJ's opinion suffers from two fatal and principal errors requiring reversal:

- The ALJ's determination that the General Counsel met its burden to prove that Challenge harbored union animus was in error. The United States Supreme Court has clarified that in order to violate Section 8(a)(3) of the Act, an employer must discriminate against an employee with the intent of discouraging membership in a union. But the record in this case proves that Challenge had absolutely no interest in discouraging UAW membership – in fact, Challenge and the UAW were partners to a neutrality agreement under which Challenge agreed to allow the UAW substantial leeway in organizing all eight of its manufacturing facilities across the country. The unrebutted evidence in the record proves that Challenge dutifully complied with all of its obligations under this agreement at all times, and a substantial percentage of Challenge's employees became represented by the UAW directly as a result of the neutrality agreement's benefits. On these facts, Challenge simply did not oppose unionization of its facilities, and held no motivation to terminate Mr. Kiliszewski for engaging in organizing activity. The ALJ found that six pieces of circumstantial evidence supported his conclusion that union animus existed, but all of those pieces of evidence rely on the assumption – which is not true of Challenge in this case – that the employer opposed unionization.
- The ALJ's determination that Challenge did not meet its burden to prove that it would have terminated Mr. Kiliszewski absent his union activity was in error. The record proves that upon receiving Ms. Sanchez's extremely serious complaint, Challenge exercised its lawful and ethical duties by investigating promptly. Mr. Kiliszewski did not refute many of Ms.

Sanchez's claims against him – in fact, he submitted a written statement that largely corroborated Ms. Sanchez's own version of the story, in which Mr. Kiliszewski described his refusal to follow Ms. Sanchez's instructions and rebuffed her decision to ask him to repair a machine by subjecting her to a profane verbal tirade. Based on Ms. Sanchez's statement, Mr. Kiliszewski's statement, and other witness statements gathered during the investigation, Challenge held a reasonable belief that Mr. Kiliszewski had violated Challenge's employee dignity policy to a very serious extent. But the ALJ overstepped his role, and tried to reconstruct and pass judgment on his own interpretation of the altercation between Ms. Sanchez and Mr. Kiliszewski instead of relying on Challenge's reasonable belief about what happened. Further, the ALJ showed unusual bias in crediting Mr. Kiliszewsi's testimony, but in criticizing the testimony of Challenge's female witnesses for tenuous or nonsensical reasons.

Because the ALJ erred in determining that Challenge harbored union animus and because Challenge would have fired Mr. Kiliszewski even absent his union conduct, Mr. Kiliszewski's Section 8(a)(3) must be dismissed. Further information material to the questions presented is available in the Argument section of this brief.

QUESTIONS PRESENTED

1. **Did the ALJ err when he concluded that the record as a whole sufficiently supported a conclusion that Challenge harbored union animus when it discharged Mr. Kiliszewski in violation of Section 8(a)(3) of the Act, even though Challenge and the UAW were parties to a neutrality agreement, and despite the fact that Challenge displayed no opposition to substantial union organizational activity pursuant to that agreement?**

2. **Did the ALJ err when he concluded that Challenge failed to carry its responsive burden to prove that it would have discharged Mr. Kiliszewski even in the absence of his union activity?**

3. **Did the ALJ err when he concluded that Challenge violated Section 8(a)(1) of the Act?**

ARGUMENT

The ALJ's recommended opinion held that Challenge violated Section 8(a)(3) of the Act when it terminated Mr. Kiliszewski. The Board should reject this opinion and dismiss Mr. Kiliszewski's 8(a)(3) charge for two broad reasons. First, the record does not prove that Challenge held animus for the UAW, and thus Mr. Kiliszewski has failed to prove one of the four essential elements of his prima facie case. This is true in this case because Challenge did not oppose unionization of its manufacturing facilities, and had in fact entered a nationwide and permissive neutrality agreement with the UAW and complied with it for over a full year before Mr. Kiliszewski's employment was terminated. This background context was essential because it completely undermines the motive Challenge might have had in firing Mr. Kiliszewski.

Second, the record contains more than ample evidence to establish that Challenge would have terminated Mr. Kiliszewski's employment even absent his support for the UAW. Challenge terminated Mr. Kiliszewski's employment after he engaged in an aggressive, profane, and insubordinate verbal altercation with a female supervisor, Norma Sanchez, on May 5, 2017 – an altercation that left Ms. Sanchez so shaken and afraid that she emailed numerous high-level Challenge managers to tell them that she "fe[lt] Mike tries to intimidate me when I ask him for help," that she "[found] Mike to be very disrespectful to me," that she was "afraid to ask for help" from him, and that she "would like for this behavior from Mike to stop." Challenge investigated, and when it interviewed Mr. Kiliszewski he not only admitted that the altercation occurred in large part as the supervisor had described, but also refused to take any accountability for it. Challenge cannot permit an employee to engage in such behavior, and it terminated his employment as a result.

I. THE ALJ'S CONCLUSION THAT CHALLENGE VIOLATED 8(A)(3) WHEN IT TERMINATED MR. KILISZEWSKI IS FLAWED BECAUSE THE RECORD PROVES CHALLENGE HAD NO INTENT TO DISCOURAGE MEMBERSHIP IN THE UAW.

In this case, the General Counsel must establish that the intent to discourage membership in the UAW motivated Challenge's decision to terminate the employment of Mike Kiliszewski. The ALJ wrongfully inferred that Challenge harbored such unlawful intent though circumstantial evidence. The Board has held that certain types of circumstantial evidence (like surveillance of union activities, timing of discharge in relation to union activity, or shifting and inconsistent rationales for discharge) can, through inference, prove unlawful union animus. But drawing this inference is inappropriate in this case because the inference inherently relies on the employer's evident opposition of the unionization of its workforce, a factual foundation which is not present in this case.

The principal flaw in the ALJ's decision is his failure to recognize the most important difference between this case and the stereotypical 8(a)(3) discharge case during an organizing campaign – Challenge did not oppose the UAW's unionization of its Holland facility. Without any evidence of opposition to the UAW, it is illogical to draw those inferences drawn by the ALJ, which is completely essential to his ultimate (and erroneous) conclusion that Challenge violated Section 8(a)(3) when it terminated Mr. Kiliszewski.

The record is replete with unrebutted, affirmative evidence proving that Challenge officially adopted a nationwide labor relations strategy of neutrality towards the UAW in 2016. This labor relations strategy was formalized by the ratification of a broad and permissive neutrality agreement between Challenge and the UAW, which permitted (among a slew of other concessions) the UAW to access all eight of Challenge's manufacturing plants across the United States, and under which Challenge agreed to recognize the UAW as the exclusive bargaining representative upon simple majority demonstration of authorization cards without an election.

Indeed, under the parties' May 2016 Neutrality Agreement, the UAW at the time of the hearing had organized five of Challenge's eight American manufacturing facilities, negotiated four Collective Bargaining Agreements with Challenge through good faith bargaining, and was in the midst of negotiating an Agreement with Challenge to cover the fifth organized plant. The General Counsel failed to introduce even a scrap of evidence to suggest that since 2016 Challenge has done anything other than work in harmony with the UAW under a positive and constructive relationship--a critical piece of background evidence that is further reinforced by the simple fact that the UAW neither joined Mr. Kiliszewski's unfair labor practice charge against Challenge nor filed one of its own.

Here, the ALJ ignored the fact that Challenge did not oppose the unionization of its Holland facility and rotely drew formalistic inferences based on circumstantial evidence which he claimed proved union animus, in reliance on historical Board cases. But the probative value of such pieces of circumstantial evidence relies upon Challenge having opposed the unionization of its Holland facility. Two examples illustrate this point. First, the ALJ relied on Challenge's surveillance of protected activity conducted in April of 2017 to prove that Challenge intended to discourage membership in the UAW. Challenge does not dispute that the Board has held in a number of cases that when an employer conducts surveillance of employees' organizing activities while attempting to discourage those employees from joining or supporting a labor organization, the surveillance presents circumstantial evidence which can be used to prove union animus in support of an 8(a)(3) claim. *See, e.g., Fresh & Easy Neighborhood Market, Inc.,* 356 NLRB 546, 558 (2011). But although the record in this case also contains evidence that Challenge surveilled employee organizing, Challenge did not oppose unionization at the Holland facility, and Challenge's purpose and intent of observing the April 2017 union activity was to

determine whether the UAW was in breach of substantive time, place, and manner organizing restrictions it negotiated into the neutrality agreement, not to further any effort to discourage membership in the UAW. Surveillance of union activity cannot prove animus per se - motive matters.

The second example is the ALJ's reliance on the timing of the discharge in relationship to the commencement of organizing activities at the Holland facility. The Board has held that timing can represent circumstantial evidence of union animus in several cases where an employee was terminated shortly after he or she engaged in organizing activity on behalf of that union; Challenge does not dispute this as a general principle of law. *See, e.g., NLRB v. American Geri-Care, Inc.,* 697 F.2d 56, 60 (2d Cir. 1982). But crucially, timing is only probative of union animus where there is some evidence that the employer opposes unionization of its operations such that the Board can fairly and logically infer intent to discourage union membership from the timing of the discharge of an employee whose termination keep employees in the plant from joining the union. Challenge's Holland facility will almost certainly be organized soon under the 2016 Neutrality Agreement anyway – Mr. Kiliszewski's discharge in May of 2017 cannot prove intent because Challenge had no anti-union motive which the discharge might have advanced.

In total, the ALJ identified six pieces of circumstantial evidence which he felt proved Challenge's union animus. As explained in detail below, the ALJ's reliance on <u>any</u> of these six pieces of evidence suffers from this same fatal flaw. To draw the inferences the ALJ did requires evidence that Challenge opposed organizing efforts at its Holland facility. But where the unrebutted record proves exactly the opposite, the rationale for the ALJ's decision does not withstand any meaningful scrutiny and should not be adopted.

A. In order to prove a Section 8(a)(3) violation, the General Counsel must establish that Challenge's decision to discharge Mr. Kiliszewski was motivated to discourage union membership.

Section 8(a)(3) of the Act provides that it is:

> [A]n unfair labor practice for an employer... by discrimination in regard to the hire or tenure of employment... to encourage or discourage membership in any labor organization.

29 U.S.C. 158(a)(3). In evaluating whether an employer has violated Section 8(a)(3), the "central question is the employer's motivation in taking the adverse action." *Ark Las Vegas Restaurant Corp. v. NLRB,* 334 F.3d 99, 104 (D.C. Cir. 2003). Specifically, for an employer's termination of an employee to be prohibited by the Act, the General Counsel must prove that the terminated employee's union or other protected activity was a motivating factor for the employer when making the decision to terminate the employee. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd 66 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982); *Taylor & Gaskin*, 277 NLRB 563 (1985). Accordingly, union animus is one of four essential elements of the General Counsel's *prima facie* case if an 8(a)(3) charge is to be successful. *Dorey Elec. Co.*, 312 NLRB 150, 151 (1993).

An employer's union animus can be proven by evidence which illustrates "the employer's attitude regarding (a) the union, (b) the organizing campaign, if there was one in progress during any relevant time, (c) employees who support the union or engage in organizational or other protected activities, and (d) other related subjects, as reflected by statements and conduct including infringements upon employees' statutory rights." *J. Ray McDermott & Co.*, 233 NLRB 946, 951 (1977).

But, to find a Section 8(a)(3) violation, consistent with the plain language of the statute, the Supreme Court has been crystal clear: the employer's decision at issue must be motivated to discourage union membership.

> The language of § 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus, this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership is proscribed.

Radio Officers v. NLRB, 347 U.S. 17, 42-43 (1954) (emphasis added).

In a 1965 case the Supreme Court re-emphasized this point, "[u]nder the words of the statute, there must be both discrimination and a resulting discouragement of union membership" for an 8(a)(3) violation to have occurred. *American Ship Building Co. v. NLRB,* 380 US 300, 311 (1965) (internal citations omitted). And in 1971, consistent with the Supreme Court's mandate, the Board made clear, "it is apparent that the distinction between lawful and unlawful discrimination must be based on whether the conduct encourages or discourages union membership, and that a finding to this effect, whether be inference or specific proof, is requisite to an 8(a)(3) or 8(b)(2) violation." *Typographical Union No. 2,* 189 NLRB 829, 830 (1971). *Also see NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399 (1983) (8(a)(3) violation required proof that discharge is motivated "by a desire to frustrate union activity").

The required union animus element of a Section 8(a)(3) charge is therefore fulfilled only when a particular employment decision evinces the employer's motivation to discourage union membership or activity amongst its employees.

B. Challenge had zero interest or motivation to discourage UAW membership for any reason.

Challenge has demonstrated the very antithesis of union animus both by entering into and strictly adhering to the terms of the 2016 Neutrality Agreement with the UAW. By ratifying the Agreement, Challenge has made it easier for its employees to join or support the union instead of taking any action to discouraging them to do so. As the record makes clear (but

as the ALJ barely acknowledged in his recommended opinion), Challenge and the UAW have been parties to a nationwide neutrality agreement since May 1, 2016. (R Ex 5). The stated purpose of this Agreement is "to enhance an efficient organizing process and maintain stable labor relations." (R Ex 5) (Emphasis added).

The 2016 Neutrality Agreement directly facilitated the growth of union membership, representation, and support in all eight of Challenge's nationwide manufacturing facilities; created a "constructive relationship" between Challenge and the UAW; and provided the UAW with broad and far-reaching access into Challenge's facilities. (R Ex 5, ¶ 1(b)). Pursuant to the terms, Challenge agreed to the following conditions, all of which granted the UAW and employees who supported the UAW far greater rights than those statutory protections provided by law:

- Challenge's promise to "not engage in any communication or conduct which, directly or indirectly, demonstrates or implies opposition to unionization of its employees or to the UAW" (See R Ex 5, ¶ 1(a));
- Challenge's agreement to provide the UAW with a full list of all production and maintenance employees in each facility upon request (See R Ex 5, ¶ 2);
- An entitlement for the UAW to enter employee break rooms at each of Challenge's eight facilities with 48 hours of notice for the purpose of speaking with employees (See R Ex 5, ¶ 3);
- A one-time opportunity for the UAW to enter each facility and conduct a 40-minute meeting with all assembled Challenge employees during paid, working time, and in the absence of any Challenge managers or supervisors (See R Ex 5, ¶ 4);

- Challenge's agreement to extend recognition to the UAW upon demonstration that a simple majority of Challenge's employees support the Union as established by a card check without holding an official election (See R Ex 5, ¶ 5-6); and
- The obligation to commence bargaining with the UAW after certification of majority status (See R Ex 5, ¶ 7).

Under the Neutrality Agreement, Challenge and the UAW have negotiated four plant-wide collective bargaining agreements (including one covering a facility where recognition was extended through an election which occurred prior to the Agreement's finalization) and to extend voluntary recognition to the UAW as the exclusive bargaining representative in four separate Challenge facilities across the country. (Tr. v.2 at 255-257). As of the date of the hearing, Challenge and the UAW were also engaged in bargaining at Plant 3 in Walker, Michigan. (Tr. v.2 at 256-257). In short, Challenge has permitted more than half of its nationwide manufacturing facilities to become unionized by the UAW without protest or opposition. And more organizing activity is on the horizon: the Neutrality Agreement's Amendment contains a stipulated schedule between Challenge and the UAW defining the order in which the UAW will attempt to organize each of Challenge's three remaining non-unionized facilities. (Tr. v.2 at 256; R Ex 6).

Testimony in the record also proved that this impact was consistent with Challenge's intent when it agreed to the 2016 Neutrality Agreement's terms. As Challenge's Vice President of Operations Keith O'Brien explained, the 2016 Neutrality Agreement and its accompanying amendment created a "partnership" between Challenge and the UAW, which "involves a mutual agreement on how our plants are to operate." (Tr. v.2 at 399). Mr. O'Brien also stated that the cooperative relationship between the UAW and Challenge "is based on our

core beliefs and principles that we have as a company." (*Id.*). In fact, both Challenge and the Union regarded the 2016 Neutrality Agreement to be of such mutual beneficial value that the parties extended the agreement through an Amendment, which was executed on September 15, 2017. (R Ex 6).

C. This six events upon which the ALJ reaches his conclusion that the Union animus motivated Challenge's decision to discharge Mr. Kiliszewski failed to support that conclusion for, among other reasons, the simple fact that Challenge did not oppose the unionization of the Holland facility.

The ALJ relied on six events to infer union animus. Each of those events standing on its own is entirely unrelated to Challenge's motivation to discharge Mr. Kiliszewski. The only possible way the ALJ could have inferred an unlawful motivation from those six events is if Challenge opposed unionization at the Challenge facility.

Specifically, the ALJ concluded that "[t]he evidence" in this case "raises an inference of anti-union animus connected to the discharge and easily clears the General Counsel's third hurdle under *Wright Line.*" (Dec. p. 17). In so reaching this conclusion, the ALJ cited to six events:

- 1) The fact that Challenge "aggressively resisted the union [organizing] campaigns in 2013 and 2015" (Dec. p. 16);
- 2) The judgment that Challenge "reacted aggressively to what it incorrectly believed was a very clear breach of the neutrality agreement" when, in 2017, "management at the Holland facility discovered that Kiliszewski was again engaging in organizing activity at a time when management believed the neutrality agreement guaranteed it a respite from such activity" (Dec. p. 16);
- 3) The determination that "[Vice President of Human Resources Mike] Tomko and [Human Resources Manager Darlene] Compeau called [supervisor] Leadingham into a meeting and

interrogated him about the identities of employees engaged in union activity and then suspended him" (Dec. p. 16);

- 4) Ms. Compeau's alleged "false accusations about national origin harassment by [Mr.] Kiliszewski and her vitriolic demeanor while making those accusations at trial," which the ALJ believed "betrayed an unusual level of animosity for which the record provides no ready explanation beyond hostility to [Mr.] Kiliszewski's recently discovered unionizing activity" (Dec. p. 17);
- 5) The "timing of the decision to discharge Mr. Kiliszewski," which occurred "just 2 or 3 weeks after the Respondent first received a report that Kiliszewski was behind a 2017 organizing effort" (Dec. p. 17); and
- 6) Testimony that "Kiliszewski was a leader of unionization efforts at the facility" (Dec. p. 17).

Each of these six events, whether standing alone or when considered together, does nothing to prove that Challenge intended to discourage membership in the UAW – especially when considered against the context of Challenge's friendly, constructive and positive relationship with the UAW. Accordingly, the ALJ erred when he held that the Charging Party had proved the existence of union animus in this case. Moreover, as more fully described below, a number of the events are mischaracterized by the ALJ and his mischaracterization is unsupported by the record evidence.

1. In light of the 2016 Neutrality Agreement, evidence that Challenge opposed union organizing drives in 2013 and 2015 cannot serve as evidence that Challenge held union animus in 2017.

The ALJ's Recommended Decision held that the General Counsel successfully demonstrated union animus when it introduced evidence that:

> Management at the Holland facility aggressively resisted the [UAW] campaigns in 2013 and 2015 by, *inter alia,* photographing Kiliszewski's interactions with co-workers, informing employees that it was "100 percent opposed to a unionized plant" and raising the specter that unionization would lead to closure and bankruptcy.

(Dec. at 16). Challenge does not refute this evidence, but the evidence of Challenge's opposition to the UAW in 2013 and 2015 is meaningless because in 2016, Challenge changed its policy toward unionization. The key decision-maker in this case was Mr. O'Brien. He became Challenge's new Vice President of Operations in 2016, after Challenge adjusted its labor relations strategy. (Tr. v.2 at 383). Various Challenge witnesses testified that Challenge formally changed its position with respect to unionization after the UAW was certified as the collective bargaining representative for employees at the St. Louis facility following a Board vote. (Tr. v.2 at 255). After this occurred, Mr. Tomko became involved in labor negotiations, and Challenge and the UAW agreed to nationwide Neutrality Agreement in May of 2016. (Tr. v.2 at 257; R Ex 5). Since that Agreement was executed in 2016, Challenge voluntarily has recognized the UAW as the exclusive bargaining representative for units in Irving, Texas; Kansas City, Missouri; Pontiac, Michigan; and in one of two plants in Walker, Michigan. (Tr. v.2 at 256). Collective bargaining agreements have been executed between the parties in each of these locations. (*Id.*). The events of 2013 and 2015 have been subsumed and rendered meaningless by Challenge's 2016 change in policy. The absence of the UAW as a party to this preceding is not a mistake – it is explained by the fact that Challenge has a positive relationship with the UAW.

2. **The record does not support that Challenge "reacted aggressively" when it "discovered that Mr. Kiliszewski was again engaging in organizing activity" in 2017.**

The ALJ's Recommended Opinion held:

> In 2017, when management at the Holland facility discovered that Kiliszewski was again engaging in organizing activity at a time when management believed the neutrality agreement guaranteed it a respite from such activity, it reacted aggressively to what it incorrectly believed was a "very clear breach of the neutrality agreement." Contrary to management's apparent misunderstanding, the neutrality agreement did not negate the federally guaranteed Section 7 rights of the employees themselves.

(Dec. at 16).

But Challenge's "aggressive reaction" to discovering evidence of UAW organizing activity constituted only the following alleged activities:

- Challenge's supervisors reported and documented any organizing activity they witnessed; and
- Craig Ritter, one of Challenge's third shift production supervisors, reported to Challenge that Mr. Kiliszewski and Mr. Leadingham engaged in organizing activity.

The ALJ erred when he concluded that these activities could prove that Challenge acted with intent to discourage membership in the UAW because this position is belied by the facts.

The ALJ would be correct that these events could constitute union animus under certain circumstances if Challenge did not have a lawful and reasonable explanation as to why the activities occurred, and if there was at least some evidence to suggest that those activities were motivated by a desire to discourage union membership. But Challenge submitted unrebutted evidence in the record to explain why those surveillance activities occurred, and that evidence does add up to prove intent of union animus. To the contrary, the evidence proves that Challenge took these steps in response to its reasonable belief that the UAW may have been engaging in conduct which violated the 2016 Neutrality Agreement, not to suppress any individual employee's protected activity, or to discourage membership in the UAW.

One distinction is critical here. The record contains no evidence that any Challenge supervisor actively surveilled organizational activity during the aborted April 2017 campaign participated in by Mr. Kiliszewski, nor was there any evidence that Challenge directed any employee to engage in unlawful surveillance. This is significant because the Board has held that it is not unlawful for an employer to ask a supervisor to report to it "information about employee union activity that [the supervisor] had innocently acquired." *Mallory, P. R. & Co., Inc.*, 175 NLRB 308, 313 (1969); *Western Sample Book and Printing Co.*, 209 NLRB 384 (1974) (holding that employer could lawfully discipline a supervisor for failing to report lawfully acquired information about employee union organizing or membership). Accordingly, Challenge committed no violation of the Act even if it asked supervisors to relay union organizing information as they happened to obtain it.

Nor would such a lawful compilation of information constitute union animus on these facts. Under the terms of the 2016 Neutrality Agreement, "the UAW and the Company agree[d] that a new organizational campaign will not commence in a new facility owned by the Company until ratification is reached at the previously organized facility." (R-Ex. 5, paragraph 9) (Emphasis added). This meant that the UAW had agreed to "only organize one facility at a time and not to commence another activity until ratification [of the Collective Bargaining Agreement] is concluded at the location that they are currently bargaining." (Tr. v.2 at 259). In April of 2017, the UAW and Challenge were in the process of negotiating a collective bargaining agreement covering the Pontiac, Michigan facility. (Tr. v.2 at 272-273). Under the terms of the Neutrality Agreement, therefore, the UAW had agreed to not engage in organizing activity at Challenge's facility in Holland until the Pontiac negotiations were complete.

Challenge witnesses testified that the surveillance activities were conducted for the sole purpose of investigating whether the UAW was in breach of the Neutrality Agreement.[1] (Tr. v.2 at 272-273). The General Counsel offered no evidence to suggest that the surveillance was conducted for any other purpose, or that any Challenge supervisors filed reports or observed any union activity which was unrelated to any conduct regulated by the Neutrality Agreement. The General Counsel also could not and did not offer one piece of evidence proving or even suggesting that Challenge opposed the organizational activity conducted by Mr. Kiliszewski, Eric Mathews (Mr. Kiliszewski's co-worker and friend), and other Challenge employees[2] which occurred in April 2017. The General Counsel did not offer one campaign piece, email, text, or even a stray comment from a supervisor or manager that suggests that Challenge opposed the Holland facility being unionized by the UAW.

Challenge recognizes that neutrality agreements like the one it entered into in May of 2016 with the UAW cannot waive and Challenge employee's individual rights, and the Respondent's hearing testimony affirmed as much.[3] Accordingly, employees have the individual right to engage in organizing activity, even if a particular union has agreed not to do so for some particular time period. Nevertheless, the ALJ's opinion portrayed the record as though it contained testimony or evidence that Challenge believed Kiliszewski breached the Neutrality Agreement when he engaged in organizing activity in the Holland plant in April of 2017. But Mr. Tomko's testimony makes it clear that Challenge regarded the 2017 organizing activity in

[1] Challenge's Vice President of Human Resources Mike Tomko provided the only evidence in the record about the topics discussed during the supervisory training sessions Challenge held after learning that conduct in violation of the Neutrality Agreement might be occurring in the Holland facility. Mr. Tomko explained that managers were trained in April of 2017 to ensure that they complied with the terms of the Neutrality Agreement, to emphasize that supervisors must remain neutral with respect to the UAW, and to stress that Challenge would permit none of its supervisors to say anything in opposition to the UAW's organizing efforts and its development efforts. (Tr. v.2 at 260). None of these topics evinces union animus – in fact, the opposite is arguably true.

[2] (Tr. v.1 at 155).

[3] (Tr v.2 at 269; 270-271; 278).

Holland not as evidence that Mr. Kiliszewski was doing anything wrong, but that the UAW was in potentially in breach. (Tr. v.2 at 269). This evidence does not demonstrate an intent to discourage union membership, so it cannot prove union animus as a matter of law.

It must also be recognized that employers have the right to enforce the agreements employers have with unions, including engaging in some type of surveillance. Also, it must be recognized that employers can engage in surveillance of protected activities if motivated by a lawful, legitimate purpose (as opposed to being motivated by an intent to discourage membership in a labor union). As an analogy, employers have the right to engage in surveillance of employees during a strike. The Board has long recognized that employers can engage in surveillance of that type of activity if the purpose is for safety or to ensure ingress and egress of supplies or contingent workers. *See, e.g., Horsehead Resource Development Co., Inc. v. NLRB,* 154 F.3d 328, 340 (6th Cir. 1998).

The surveillance in this case is similar to that type of activity. Challenge had a legitimate purpose for reporting union organizing activity which occurred in violation of the 2016 Neutrality Agreement independently from the employees' Section 7 rights. The General Counsel failed to put on any evidence that questioned Challenge's intent or motivation of the surveillance. The reason why is simple: Challenge did not oppose the UAW, and the surveillance activities upon which the ALJ relies had nothing to do with supporting or discouraging unionization, but were conducted solely with the intent to ensure of Challenge's 2016 Neutrality Agreement with the UAW. Again, as with the other five events upon which the ALJ relies, the inference of unlawful motivation only withstands scrutiny if Challenge had opposed unionization of its Holland facility--which it undeniably did not.

3. **Challenge's interrogation and (rescinded) suspension of Mr. Leadingham is evidence of Challenge's intent to adhere to the 2016 Neutrality Agreement, not its union animus, and Mr. Leadingham's comments to Mr. Kiliszewski have no nexus or union-animus by Challenge.**

The ALJ next argues that union animus was shown from Challenge's treatment of Carl Leadingham, one of Challenge's maintenance supervisors working on third shift:

> Tomko and Compeau called Leadingham into a meeting and interrogated him about the identities of employees engaged in union activity and then suspended him. After Leadingham, a supervisor, left the meeting, he contacted Kiliszewski and gave warnings that constituted threats of unspecified reprisals for union activity and which created the impression that union activities were under surveillance by the Respondent.

But the ALJ erred in concluding that this evidence demonstrated Challenge's intent to discourage membership in the UAW amongst its employees for two reasons:

- First, Mr. Tomko and Ms. Compeau "interrogated" Mr. Leadingham for the purpose of ensuring that no supervisor either offered opposition to or interfered with employees' rights to engage in union organizing activities, as well as to determine if the UAW had breached the Neutrality Agreement.
- Second, what the ALJ refers to as "threats" has no nexus to any anti-union campaign by Challenge. The so-called "threat" was an isolated comment allegedly made by Mr. Leadingham based upon a singular conversation he had with one other manager, Mr. Ritter. The General Counsel failed to offer any foundational evidence to support that Mr. Leadingham's advice to Mr. Kiliszewski – that he should "watch his back" - had anything to do with Challenge's opposition to the UAW or its intent to discourage union membership in general.

a. The meeting that occurred between Mr. Tomko, Ms. Compeau and Mr. Leadingham fails to support union-animus.

While Challenge disputes the ALJ's characterization of the meeting between Mr. Tomko, Ms. Compeau and Mr. Leadingham,[4] the fact remains that even the ALJ's mischaracterization fails to establish union-animus. Challenge met with Mr. Leadingham for legitimate, lawful, and reasonable purposes, none of which was to discuss any subject which could create an inference that Challenge possessed union animus.

Mr. Tomko testified that he and Ms. Compeau met with Mr. Leadingham because Challenge was concerned that Mr. Leadingham may personally have been violating the National Labor Relations Act and Challenge's obligations under the 2016 Neutrality Agreement. Challenge had been informed that Mr. Leadingham was attending union meetings despite his status as a Challenge supervisor. (Tr. v.2 at 267-68). Mr. Leadingham's presence at the meetings could be considered a violation of the National Labor Relations Act because it could interfere with employees' Section 7 rights. *See, e.g., N.L.R.B. v. Lamar Electric Membership Corporation,* 362 F.2d 505 (5th Cir. 1966). As Mr. Tomko testified, Challenge had a lawful and appropriate motivation – one that is antithetical with a finding of union animus, because it evinced an intent to avoid interfering with lawful employee organizing activity – to determine whether the rumors about Mr. Leadingham's involvement with union meetings were accurate and to curtail this activity if they were. Indeed, it is what the National Labor Relations Board would direct any employer to do if it discovered an employer supervisor might be meddling in representational or organizational matters. *See, e.g., N. L. R. B. v. Int'l Typographical Union,*

[4] The evidence in this record is disputed about whether or not Mr. Tomko and Ms. Compeau – either together or separately – ever "interrogated [Mr. Leadingham] about the identities of employees engaged in union activity." (Dec. at 16). Mr. Tomko testified that the subject of inquiry at this meeting was Leadingham's own personal involvement in union meetings, without more. (Tr. v.2 at 267-68). In contrast, the only scintilla of evidence that any Challenge supervisor asked Mr. Leadingham about "the identity of employees engaged in union activity" comes from a one-word affirmative answer offered by Mr. Leadingham during his direct examination by the General Counsel. (Tr. v.1 at 136).

452 F.2d 976, 980 (10th Cir. 1971) ("active participation in union affairs by supervisors was aptly characterized as 'interference' by the Board").

Whether Mr. Leadingham may have been asked about the identities of employees who engaged in union activity is consistent with Challenge's right to determine whether the UAW was violating the Neutrality Agreement and is perfectly lawful conduct. Indeed, the ALJ himself during the during the course of the hearing stated: "I assume an employer in order to figure out if a Neutrality Agreement was being violated by such activity would have to figure out whether the UAW was initiating [that activity] or directly involved in it, or it was a such like a wildcat organizing ... campaign. So there could be some inquiry." (Tr. v.2 at 275-276).

Moreover, Board law is clear. An employer may ask a supervisor whether employees are engaging in union activity. *Mallory, P. R. & Co., Inc.*, 175 NLRB 308, 313 (1969); *Western Sample Book and Printing Co.,* 209 NLRB 384 (1974). An employer may also lawfully ask a supervisor employee (indeed, even if he is mistaken about his supervisory status) about the supervisor's alleged union activity or about whether the supervisor solicited other employees to engage in union activities of their own. *See, e.g., Pillows of CA*, 207 NLRB 369 (1973). What the ALJ believes Challenge did in this case in meeting with Mr. Leadingham fits within this standard.

But what is absent from the record is also significant. Despite the fact that Mr. Leadingham himself was called as a witness by the General Counsel and is no longer employed by Challenge, Mr. Leadingham offered zero evidence that Mr. Tomko, Mr. Ritter, or Ms. Compeau ever directed him to oppose unionization on behalf of Challenge, or that Mr. Leadingham was aware of any motivation on the part of Challenge to discourage any employee's

involvement with the UAW. In short, the General Counsel failed to establish the evidentiary foundation necessary to conclude that the meeting evinced any union animus.

b. The record proves that Mr. Leadingham's phone call to Mr. Kiliszewski does not evince any intent on the part of Challenge to discourage his own union membership or organizing activity.

The ALJ held in his recommended opinion that Mr. Leadingham "contacted Kiliszewski and gave warnings that constituted threats of unspecified reprisals for union activity and which created the impression that union activities were under surveillance by the Respondent" "[a]fter Leadingham, a supervisor, left the meeting" with Mr. Tomko and Ms. Compeau. (Dec. at 16-17; 4). This, the ALJ incorrectly reasoned, tipped Challenge's hand and evinced the Respondent's true union animus because it implied that Mr. Tomko or Ms. Compeau told Mr. Leadingham something during their meeting which led him to believe that they were critical of Mr. Kiliszewski's union activity during this meeting. But the inference is invalid because the ALJ materially misstates the record.

Mr. Leadingham's own testimony presented at the hearing was that he called Mr. Kiliszewski after a later meeting with Mr. Ritter, not with Mr. Tomko and Ms. Compeau. (Tr. v.1 at 136). And Mr. Leadingham testified it was Mr. Ritter – not Mr. Tomko or Ms. Compeau – whose comments inspired Mr. Leadingham to tell Mr. Kiliszewski to "watch his back." (Tr. v.1 at 136-137).[5]

Also, Mr. Leadingham denied that Mr. Ritter ever told him that Mr. Kiliszewski should "watch his back." (Tr. v.1 at 145). Instead, the warning for Mr. Kiliszewski to "watch his back" came from Mr. Leadingham himself, and it was not based on anything Mr. Ritter actually told Mr. Leadingham (let alone what Mr. Tomko or Ms. Compeau told him) beyond the

[5] To be clear, Mr. Ritter denied this occurred and the ALJ failed to account for this. (Tr. v.2 at 250-251).

fact that Challenge was monitoring union activity for the purposes of monitoring the UAW's compliance with the Neutrality Agreement. (Tr. v.1 at 145-146). Mr. Ritter also denied ever talking to Mr. Leadingham about union activity, telling him that Mr. Kiliszewski was being "targeted" by Challenge. (Tr. v.2 at 250-251). Thus, the General Counsel failed to establish the necessary evidentiary foundation that this meeting between Mr. Ritter and Mr. Leadingham or Mr. Leadingham's comments to Mr. Kiliszewski had any relation to Challenge opposing the UAW.

The only evidence in the record is that Challenge was monitoring union activity – not to discourage membership in the UAW--but to monitor the UAW's compliance with the 2016 Neutrality Agreement. Thus, even if Challenge violated Section 8(a)(1) of the Act when Mr. Leadingham made this statement to Mr. Kiliszewski for the reasons described in Section III.A of the ALJ's opinion (Dec. p. 14-15), the ALJ erred to the extent he inferred union animus on Challenge's part as a result of Mr. Leadingham's own subjective (and baseless) warning.[6] Not every Section 8(a)(1) violation establishes union animus. *See, e.g.,* Accurate Prod., Inc., 170 NLRB 1517, 1530, fn. 40 (1968) (holding that violation of Section 8(a)(1) by maintaining and enforcing an unlawful no-solicitation rule did not support a finding that employer conduct was motivated by union animus). This is especially true when measured against the background evidence in this case.

[6] Further, Mr. Leadingham has had no connection to the events related to the terms of Mr. Kiliszewksi's employment. Nor did Mr. Ritter, and the statement "watch your back" fails to demonstrate motive. Certainly Mr. Leadingham could have testified that Mr. Kiliszewski need to watch his back because Challenge knew he was a ring leader for the UAW organizing efforts and Challenge wanted no part of the UAW. But Mr. Leadingham did not, nor did any other witness, because it was not true.

4. **The ALJ erred when he claimed that Ms. Compeau made "false allegations" of national origin discrimination against Mr. Kiliszewski, and further erred when he inferred union animus from Ms. Compeau's opinion of Mr. Kiliszewski.**

The fourth event upon which the ALJ based his finding of union animus came from the testimony of Darlene Compeau, the Challenge Human Resources employee who first investigated Ms. Sanchez's allegations of abusive mistreatment and insubordination from Mr. Kiliszewski. The ALJ concluded that:

> Compeau's false allegations of national origin harassment by Kiliszewski and her vitriolic demeanor while making this accusations at trial betrayed an unusual level of animosity for which the record provides no ready explanation beyond hostility towards Kiliszewski's recently-discovered unionizing activity.

(Dec. at 17). Challenge does not dispute that Ms. Compeau's testimony during the hearing was erratic, halting, and demonstrated anxiety and nervousness. But, the ALJ's reasoning is flawed for two reasons:

- First, the ALJ makes an illogical conclusion that does not withstand scrutiny. Ms. Compeau testified that she believed Mr. Kiliszewski's outburst against Ms. Sanchez was inspired (in whole or in part) by Ms. Sanchez's race or sex. The ALJ did not interpret the record to contain any evidence that Mr. Kiliszewski harassed Ms. Sanchez on the basis of her race or her sex. But he regarded Ms. Compeau's testimonial demeanor as "vitriolic," and thus inferred that she must have been harboring union animus when testifying. The logical leap is, frankly, bizarre, and the ALJ's determination that this is evidence of Challenge's union animus is clear error.
- Second, the ALJ too easily dismisses some of Ms. Compeau's investigative conclusions in a tone-deaf and inappropriate manner.

a. Although Ms. Compeau's testimony could be faulted in many ways, the ALJ erred when he held that Ms. Compeau betrayed her union animus through her testimony.

The ALJ must establish that there is some logical or factual connection between what he regarded as Ms. Compeau's unsupportable conclusion that Mr. Kiliszewski engaged racial and sexual harassment/discrimination of Ms. Sanchez and the General Counsel's claim that Mr. Kiliszewski was discharged to discourage support for the UAW at the Holland facility. As a threshold issue, the General Counsel cannot meet this burden as the only evidence on the record is that Challenge did not oppose the unionization of the Holland facility. More directly, however, the recommended opinion offers absolutely no logical link between the ALJ's conclusion that Ms. Compeau disliked something about Mr. Kiliszewski and the ALJ's conclusion that the "something" she disliked was his support for the UAW.

Moreover, the ALJ's holding in this regard is deeply ironic because it shows that he made the exact same error for which he condemns Ms. Compeau. In the recommended decision, the ALJ takes Ms. Compeau to task for making the "unsupported" claim that Mr. Kiliszewski held racial and sexual animus against Hispanic females because of the way he treated Ms. Sanchez during his profane tirade against her on May 5, 2017. (Dec. at 7). But then the ALJ assumed – despite the presence of "not a whit of support in the record"[7] for his assumption - that Ms. Compeau held union animus against the UAW based on the conclusions she reached in her investigation of the May 5 incident. The ALJ's assumption is even more tenuous evidence of error due to the fact that there is more evidence on the record, as described below, to support Ms. Compeau's assumptions about Mr. Kiliszewski's motivations than there is to support the ALJ's assumptions about Ms. Compeau.

[7] This is a quote from the ALJ's condemnation of Ms. Compeau's testimony. (Dec. at 7)

b. The ALJ mischaracterizes findings of Ms. Compeau and her understandable sensitivity to the conduct of Mr. Kiliszewski.

To be clear, none of Ms. Compeau's testimony ever directly attributed any overtly racially-derogatory statements to Mr. Kiliszewski – against Ms. Sanchez or any other person. Instead, Ms. Compeau made it evident that she was making an interpretation about Mr. Kiliszewski's true motivations behind his profane outburst towards Ms. Sanchez on the night of May 5 based on her life experiences and her interactions with Mr. Kiliszewski:

> Q: What did you believe happened that night based on your interview with Mr. Kiliszewski and reviewing General Counsel's Exhibit 3?
>
> A: I believed that Norma [Sanchez] asked for help. And the back and forth here, she asked for help and he said tell your – where is your – where are your second shift, your fucking second shift maintenance guys? Why aren't they doing what they need to do? Go away. And I mean, and so she looked for them. And then when she came back, she asked again for help. And you know, get out of my face, go away, you dumb, inexperienced, unprofessional, disrespectful Hispanic woman, go away.
>
> Q: That's how you interpreted it?
>
> A: That's how I interpreted it, yes.

(Tr. v.2 at 296). Ms. Compeau never attributed racial hate speech to Mr. Kiliszewski,[8] and the ALJ misstates the record to the extent he claims that Ms. Compeau actually accused Mr. Kiliszewski of committing legally-actionable racial harassment against Ms. Sanchez when she recommended termination of his employment to Mr. O'Brien.

But was it really so unfounded, "vitriolic," and hysterical for Ms. Compeau to view the evidence gathered during her investigation and sense a subtle racial or misogynist undertone to Mr. Kiliszewski's behavior on May 5? During Mr. Kiliszewski's May 9 meeting with Ms. Compeau, Maintenance Manager Jeff Glover, and Mr. O'Brien, he produced a

[8] (Tr. v.2 at 334).

handwritten statement (GC Ex 3) including numbered paragraphs, intended to specifically respond to Ms. Sanchez's own allegations from her May 6 emailed complaint. (Tr. v.1 at 70-71). A careful review of how Mr. Kiliszewski describes his own behavior that night, as well as his own justifications for engaging in that behavior as compared with how he felt "disrespect[ed]" by Ms. Sanchez.

Mr. Kiliszewski admits in his own statement that he refused to follow Ms. Sanchez's instructions, responded to her directives by shouting "where's your fucking second shift maintenance," and told her to "get the hell away from him" when she wouldn't back down. He also described Ms. Sanchez – a production supervisor whose orders he was obligated to follow as an employee of Challenge[9] – as "unprofessional," "inexperienced," and "disrespectful" as evidenced by the fact that she "didn't ask" but "demanded" that he fix a machine. (GC Ex 3). He admits to telling Ms. Sanchez that he wouldn't take "take orders from [her], only requests." In response to Ms. Sanchez's statement that she found Mr. Kiliszewski to be disrespectful, that she was afraid to ask for his help, that she felt he humiliated her in front of her subordinate employees, and that she wanted his behavior to stop," Mr. Kiliszewski responded by quipping that "respect isn't given, it's earned."

The Southern District of New York federal court has recognized that our nation's employment laws allow discrimination claims to be based on "dog-whistle" theories, which it defined as "the use of code words and themes which activate conscious or subconscious racist concepts and frames." *See, e.g., Lloyd v. Holder,* 2013 WL 6667531 (S.D.N.Y. Dec. 17, 2013). Thus, the law recognizes that while people may have learned not to use explicitly racially inflammatory language, it does not mean that they are immune from using more subtle, but still

[9] (Tr. v.2 at 358).

serious, discriminatory and harassing language. The ALJ has evidently not adopted this perspective.

It is not possible to look into Mr. Kiliszewski's heart or mind and determine why he felt that Ms. Sanchez was "disrespectful" when she directed him to perform his job on the night of May 5. Nor can we know why Ms. Sanchez had failed to sufficiently "earn" Mr. Kiliszewski's respect. Accordingly, Ms. Compeau may be wrong when she testified that she felt Ms. Sanchez's sex or race may have had something to do with the way Mr. Kiliszewski treated her during the incident leading to his termination. She may even have been influenced by the way Mr. Kiliszewski treated her and developed personal animosity towards him. *Sun Transport, Inc.*, 340 NLRB 70, 75 fn.7 (2003) ("personal animus rather than union animus" does "not provide the type of animus that would be useful" in proving a Section 8(a)(3) charge).

But the ALJ is also wrong to conclude that Ms. Compeau's "unusual level of animosity" towards Mr. Kiliszewski could only be explained by inferring "hostility towards Kiliszewski's recently discovered[10] unionizing activity" (Dec. at 17), Ms. Compeau also testified (1) that she had personally felt disrespected by Mr. Kiliszewski during her investigation into Ms. Sanchez's allegations when he turned his back to her when she was attempting to carry out his interview;[11] (2) that she felt so threatened by Mr. Kiliszewski's attitude towards her on May 5 that she took steps to ensure that Mr. O'Brien attended her interview of Mr. Kiliszewski;[12] (3) that Mr. Kiliszewski's demeanor changed when Mr. O'Brien – a male - conducted the meeting;[13] (4) that she had no familiarity with Mr. Kiliszewski prior to her investigation of the May 5

[10] There was nothing recent about the discovery. Mr. Kiliszewski had been a known long-time supporter of the UAW.
[11] (Tr. v.2 at 289).
[12] (Tr. v.2 at 290).
[13] (Tr. v.2 at 290-291).

incident;[14] and (5) that she knew about Challenge's Neutrality Agreement with the UAW and that pursuant to its terms, Challenge would not "oppose the organization of our plants. We have a systemic process to the organization of our plants."[15] Dismissing Ms. Compeau's concerns with a wave of the hand reflects a failure to appreciate the historical difficulties females who have had to work in the male dominated industries in our country have faced. But, whether Ms. Compeau is correct or not, misses the point. The ALJ fails to explain why his conclusion that she incorrectly brought racial and sexual harassment concerns forward establishes that therefore she was motivated by union animus. (Tr. v.2 at 281).

5. **The ALJ erred in concluding that the timing of Mr. Kiliszewski's discharge infers that Challenge harbored union animus.**

The ALJ also held that:

> An inference of anti-union animus is also supported by the timing of the decision to discharge Kiliszewski. Kiliszewski had not received prior discipline of any kind during his more than 8 years with the Respondent. Then just 2 or 3 weeks after the Respondent first received a report that Kiliszewski was behind a 2017 organizing effort, the Respondent not only disciplined him, but imposed the ultimate discipline of discharge.

(Dec. at 17). In the garden variety union campaign where the employer opposes the unionization of its operations, Challenge does not contest that timing could be evidence from which animus could be inferred. *See, e.g., Vincent Industrial Plastics, Inc. v. NLRB,* 209 F.3d 727, 735 (D.C. Cir. 2000). But in this case, the proximity of Mr. Kiliszewski's discharge date to his 2017 organizing activity is explained by his admitted conduct directed at Ms. Sanchez on May 5 – not his unopposed union activity in April. It is that simple. *See, e.g., Good Samaritan Medical Center v. NLRB,* 858 F.3d 617, 643 (1st Cir. 2017) ("the probative value of the timing is far from obvious given that the protected and unprotected activity occurred at the same time").

[14] (Tr. v.2 at 281).
[15] (Tr. v.2 at 281).

6. **Although the ALJ correctly held that Mr. Kiliszewski was a "leader" of union organizing activity at the Holland plant, it is improper to infer union animus from his discharge based solely off his UAW allegiance under the circumstances.**

The ALJ's sixth and final event from which he concluded that Challenge harbored union animus was the fact that "[t]he evidence shows that Kiliszewski was a leader of unionization efforts at the [Holland] facility." (Dec. at 17). But Mr. Kiliszewski's status as a "leader" of the efforts cannot stand alone to support an inference of union animus because his termination is unlikely to discourage Challenge's employees from joining the UAW to a greater degree than the UAW's right to access Challenge's facilities without opposition and encourage support directly. Said differently, the dissuasive effect terminating Mr. Kiliszewski will likely have on union membership will be dwarfed by the persuasive effect on UAW membership which is fostered by the access and neutrality promises Challenge made to the UAW in the 2016 Neutrality Agreement.

II. CHALLENGE PROVED THAT IT WOULD HAVE FIRED MR. KILISZEWSKI EVEN ABSENT HIS PROTECTED CONDUCT, AND THE ALJ ERRED WHEN HE HELD TO THE CONTRARY.

Below is the complaint Ms. Sanchez emailed to a slew of Challenge managers and human resources staff just after 1:00 AM on May 6, 2017, about an altercation she had with Mr. Kiliszewski mere hours prior:

> Subject: Mike Kiliszewski
>
> I continue to have issues with Mike Kiliszewski. I have addressed my concerns with Larry Boyer and not much has changed. Today around 10:00 PM I asked Mike to come to restart w079 [a machine in Area 1]. Mike was in the area 1 maintenance area talking with another maintenance person... After around 10 minutes, w079 was still down and I went to Mike still [in] the maintenance area talking. I said Mike I need you to go fix 79. Mike screamed[16] to

[16] Ms. Sanchez clarified that Mr. Kiliszewski "was shouting. Like he was not talking normal. Like he was just – he's raised his voice to me" "[r]eally loud." (Tr. v.2 at 222).

> me Where's your fucking 2nd shift maintenance guy? I told him that they were working in other cells… I told Mike this is why I'm asking you. Mike said You're not my boss, you don't tell me what to do. Then he told me to get the fuck out [of] his face… As I walked away Mike yelled Fuck you bitch. I feel Mike tries to intimidate me when I ask him for help. I find Mike to be very disrespectful to me and I am afraid to ask for help because he give me bad attitude. I have a witness statement from an employee who also heard Mike call me names… I would like for this behavior from Mike to stop.

(R Ex 8) (emphasis added). No one has alleged (nor did the ALJ find or have reason to find) that Ms. Sanchez' decision to make this complaint was motivated at all by Mr. Kiliszewski's support for the UAW or that she knew about his support for the UAW at all. (Tr. v.2 at 231). She complained because she "didn't want it to happen again." (Tr. V.2).

In sum, Ms. Sanchez's email placed Challenge on notice that a male maintenance employee (1) refused to follow her work directives; (2) "screamed" at her when she told him to perform his job; (3) used profanity towards her ("where's your fucking second shift maintenance guy," "get the fuck out [of] his face," and "fuck you, bitch"); (4) "tries to intimidate" her when she asks him for help; (5) was "disrespectful" to her; and (6) caused her to be "afraid to ask for help." (R Ex. 8). She concluded her complaint by stating that she "would like for this behavior from Mike to stop." (R Ex 8).

Challenge did exactly what the law and Challenge's policies require upon receipt of such a complaint. Challenge investigated the complaint. As the law and policy required, it made conclusions based upon the investigation, and then took appropriate remedial steps to ensure the behavior would not be repeated. As explained below, Challenge reasonably concluded that Mr. Kiliszewski's conduct violated its employee dignity policy based on his profane language, disrespect, aggressiveness and insubordinate conduct. The magnitude of the

conduct warranted serious corrective action, but Mr. Kiliszewski's failure to take accountability compelled that his discharge was the only appropriate remedy.

A. Challenge investigated Ms. Sanchez's complaint.

The investigation began with Mr. Kiliszewski, who largely corroborated Ms. Sanchez's story in a written, numbered statement he submitted to Challenge when Challenge interviewed him on May 9. (GC Ex 3). Mr. Kiliszewski's written statement responded directly to statements made in Ms. Sanchez's complaint. As laid side-by-side:

Ms. Sanchez's Typed Allegation	Mr. Kiliszewski's Handwritten Response	#
"I continue to have issues with Mike Kiliszewski."	"There are no issues ever, the only issue in the past was on 4042 when she ok'd bad parts, and I shut it down, Q.C. manager also agreed with me "	1
"Today around 10:00pm I asked Mike to come restart w079."	"Didn't punch in until 10:17 pm, 10 minutes later still not in the boiler."	2
"After around 10 minutes, w079 was still down and I went to Mike still [in] the maintenance area talking."	"When I punched it at 10:17 I was approached w/ issues on 4W055A robot 1 tip dresser broke, which was my pass down, still not on clock."	3
"I said Mike, I need you to go fix 79."	"Norma didn't ask, she demanded as [Eric] Mathews and I told her nicely the first time we're not on the clock yet, this is now 10:23, Eugene 2nd shift maint. is talking w/ operator on 4W018, she could've sent him, he was still on the clock doing nothing."	4
"Mike screamed to me Where's your fucking 2nd shift maintenance guy?"	"Now she's pushing the limits and heading into a hostile work environment and harassment situation, and yes I said fucking 2nd shift maintenance." "Back to Eugene talking on 4W018 operator while it wasn't down & Norma [Sanchez] was 20ft from him and never approached him, if anything he should've been in 55A finishing a robotic issue diagnosis."	5 & 6
"I told him they were working in other cells... I told Mike this is why I'm asking you."	"Again Norma didn't ask she demanded and her exact words (You'll do as I say, when I say)"	7
"Mike said you're not my boss, you don't tell me what to do."	"Then I and [Eric Mathews] explained as tensions are escalating, you're not our supervisor, We don't take orders from you, only requests."	8
"Then he told me to get the fuck out of his face."	"Told her to get the hell away from me and not to bother us until we were on the clock, clearly unprofessional & disrespect on Norma's behalf. Another example of inexperience."	9
"I say I'm going to tell your boss."	"She says she's going to see our boss, I said would you like me to show you the way and again explained to her we were not on the clock."	10
"As I walked away Mike yelled Fuck you bitch."	"As she walked away I never said F.U. Bitch, [Eric] Mathews was 2 ft away when the conversation took place, which then got him to go off and holler at her again (we're not on the clock)"	11
"I feel Mike tries to intimidate me when I ask him	"I don't intimidate anyone. If any super requests my	12

Ms. Sanchez's Typed Allegation	Mr. Kiliszewski's Handwritten Response	#
for help "	assistance I do as they need"	
"I find Mike to be very disrespectful to me and I am afraid to ask for help because he give me bad attitude I have a witness statement from an employee who also heard Mike call me names. This happens right out on the production floor and I would like for this behavior from Mike to stop "	"Respect isn't given, it's earned "	13
- No specific reference	"There were 5 employees total that were in the area. Lily, Stacey, Gerald, Ian, Miss Willy, all of which clearly stated Norma was the aggressor and was out of line "	14
- No specific reference	"All any super has to do is use a little respect We go beyond our means to do our jobs every day, I have a damn good work record "	15

(GC Ex 3) (Emphasis added). Thus, Mr. Kiliszewski in his own statement (later reiterated during both direct and cross examination at the hearing) admitted to all of the following facts:

- That a confrontation occurred between him and Ms. Sanchez on May 5, 2017;
- That he yelled "where's your fucking 2nd shift maintenance guy" to Ms. Sanchez when she approached him a second time seeking assistance repairing W079;
- That he refused Ms. Sanchez's "order" to repair W079 because she was not his supervisor, informing Ms. Sanchez that he didn't "take orders from [her], only requests;"
- That he told Ms. Sanchez to "get the hell away from me" after refusing to follow her order; and
- That he believed his conduct was justified even if Ms. Sanchez found it "intimidat[ing]" because "respect isn't given, it's earned " (Emphasis added).

Perhaps worse, Mr. Kiliszewski refused to take any accountability when Challenge interviewed him. (Tr. v.2 at 295;[17] 365-66;[18] 397-98[19]). Put simply, after interviewing Mr. Kiliszewski,

[17] Ms Compeau. "[H]e didn't take any ownership for any of this. He didn't take – there was nothing in any of the conversation, nothing that showed that he, that he owned any of this, that he had any accountability for [the] interaction between him and Norma [Sanchez] "

Challenge's management knew he'd done something immensely inappropriate and had absolutely no assurance that he wouldn't do it again if allowed to continue to work for Challenge.

In addition to interviewing Mr. Kiliszewski, Challenge interviewed David Napier, who Ms. Sanchez had identified as the individual referenced in her mail who had provided the written statement. (Tr. v.2 at 287). Mr. Napier's contemporaneous written statement was admitted into evidence (R Ex 14) as well as the statement confirming that what he had told Ms. Sanchez was accurate (R Ex 15). Mr. Napier's written statement reads as follows:

> 10:25 PM 5-5-2017
>
> I David Napier heard maintenance man (Mike) tell norma Fuck You Bitch while in a screaming match.

(R Ex 14). Accordingly, Mr. Napier's statement corroborated the most severely offensive and misogynist missive that Ms. Sanchez claimed Mr. Kiliszewski had directed to her.

Challenge also interviewed the five witnesses that Mr. Kiliszewski identified. Those witnesses provided conflicting and confusing testimony, however. Many of the witness statements, which were collected a week after the event, also contradicted even details about the confrontation about which Mr. Kiliszewski, Ms. Sanchez, and Mr. Napier agreed. Several witnesses, for example, incredibly testified that neither party used profanity against the other, and one even testified that Mr. Kiliszewski did not use profanity even though Mr. Kiliszewski himself admitted he had. The witness statements were assembled primarily by Ms. Compeau,

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[18] Q: During the course of that meeting or at any time during the investigation, did Mr. Kiliszewski ever offer the sense that he was sorry or he was apologizing for his behavior?
Mr. Glover: No.
Q: Did []you get the sense that he was taking responsibility or accountability for his behavior?
Mr. Glover: I don't think he took responsibility or accountability. I don't think he denied what he had done. But as far as taking any responsibility that it was wrong, no.

[19] Mr. O'Brien: "There was no – there was no remorse. There was no accountability. It was just like it was to some degree in his mind, my takeaway that morning was [that Mr. Kiliszewski thought] the actions were acceptable."

who then provided them Mr. O'Brien, Challenge's nationwide Vice President of Operations, who was the ultimate decision-maker in this case. (Tr. v.2 at 400). Mr. O'Brien testified about his knowledge and familiarity with Ms. Sanchez and her role as a team lead. (Tr. v.2 at 387). He testified that she was someone who was trustworthy, believable, and for whom he had respect. (Tr. v.2 at 400-401). Mr. O'Brien testified that he had not been familiar with Mr. Kiliszewski, did not know that Mr. Kiliszewski supported the UAW, and that his first involvement with Mr. Kiliszewski was as a result of this incident with Ms. Sanchez. (Tr. v.2 at 399). Mr. O'Brien was brought into the interview with Mr. Kiliszewski after it had already started because of Mr. Kiliszewski's aggressive and uncooperative conduct.[20] (Tr. v.2 at 391).

B. Challenge decided to terminate Mr. Kiliszewski.

Mr. O'Brien, the ultimate decision-maker summarized Challenge's decision to terminate Mr. Kiliszewski's employment for the following broad reasons:

- First, Mr. Kiliszewski treated Ms. Sanchez in a demeaning, inappropriate and disrespectful manner on the night of May 5 by yelling at, swearing at, and acting aggressively towards her, thus violating Challenge's employee dignity and anti-harassment policy in the process. (Tr. v.2 at 400).
- Second, Mr. Kiliszewski was insubordinate when he failed to follow Ms. Sanchez's reasonable work directives. (Tr. v.2 at 404).

[20] The ALJ wrongfully concludes that because of Mr. O'Brien's presence in this meeting, he therefore had knowledge of Mr. Kiliszewski's support for the UAW. (Dec. at 16). However, the only testimony to which the ALJ cites is that of Mr. Glover, who testified that he believed at some point Mr. Kiliszewski referenced his support for the UAW during the meeting with which Mr. O'Brien was ultimately involved. However, the record is clear that Mr. O'Brien was not involved in the entire meeting. Even Mr. Kiliszewski's own testimony fails to establish that he brought up his union support in the presence of Mr. O'Brien or for that matter during the meeting at all Mr. O'Brien also denied that he knew about Mr. Kiliszewski's union support at the time he decided to terminate his employment. (Tr. v.2 at 402). For this reason, Challenge excepts to the ALJ's determination that Mr. O'Brien was aware of Mr. Kiliszewski's union support, and the Board should dismiss Mr. Kiliszewski's charge on this basis. *See, e.g., Goldtex, Inc v. NLRB,* 14 F.3d 1008, 1011 (4th Cir. 1994). Challenge also excepts to the ALJ's decision because it claims that "Plant Manager [Drew] Ferris testified that Mr Kiliszewski had brought up his support for the Union during the May 9 meeting," thus imputing knowledge to Mr. O'Brien. (Dec. at 7) But Mr. Ferris did not testify at the hearing.

- Third, Mr. Kiliszewski during the course of his interview was non-cooperative and combative, showed no remorse, and took no accountability for his wrongful actions that he directed at Ms. Sanchez (Tr. v.2 at 397-398).

Mr. O'Brien explained during his testimony why from his prospective all of this amounted to a reason to terminate Mr. Kiliszewski's employment:

> I looked at the facts, looked at the statements that had been presented. I looked at the interaction that Mike [Kiliszewski] and I had that morning. I looked at past history. But ultimately it came down to this is not how we can treat another employee inside of our manufacturing plant when a basic request is made to fix a piece of equipment and the response is what was noted [in Mr. Kiliszewski's written response.] But ultimately, what it came down to is Norma [Sanchez] was believable. I worked with Norma. There was never a case where Norma had presented anything to me that wasn't believable. Norma wasn't considered a high maintenance employee who griped a lot or did anything else. I mean she did her job every day and she was quiet, but she got her job done. And when she []included me on the statement [R Ex 8] I knew it was serious enough, that's first off.
>
> But what I looked into and with Darlene [Compeau's] help we well, and looking at other items . . .I mean it was a case of it was just we couldn't continue to tolerate that type of behavior happening on our premises moving forward.

(Tr. v.2 at 400-401).

Mr. O'Brien also testified that after evaluating all of the evidence, he held a reasonable belief that (1) Mr. Kiliszewski had shouted "where's your fucking second shift maintenance guys" at Ms. Sanchez;[21] (2) Mr. Kiliszewski told Ms. Sanchez to "get the fuck out of my face;[22] (3) Mr. Kiliszewski shouted "fuck you bitch" at Ms. Sanchez as she walked away.[23]

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[21] (Tr. v.2 at 401).
[22] (Tr. v.2 at 401).
[23] (Tr. v.2 at 402).

C. The ALJ failed to give proper weight to Challenge's asserted legitimate non-discriminatory reason for discharging Mr. Kiliszewski and overstepped his role.

1. Challenge had more than sufficient reason to discharge Mr. Kiliszewski.

The legal standard is clear and uncontroversial. An employer is protected "from liability even in the face of a finding of anti-union animus" if there is credible proof that the disciplinary action at issue constituted a legitimate business decision. *Synergy Gas Corp. v. NLRB*, 19 F.3d 649, 652 (D.C. Cir. 1994) (citing *Elastic Stop Nut Div. of Harvard Indus. v NLRB*, 921 F.2d 1275, 1280 (D.C. Cir. 1990)). Again, Challenge's conduct is only unlawful if there is a nexus between Mr. Kiliszewski's discharge and Challenge having been motivated to discharge Mr. Kiliszewski to discourage support for the UAW. However, as set forth above, no nexus can exist for the simple reason that Challenge did not oppose employee support for the UAW. But even if it had, Mr. Kiliszewski's discharge stands on its own because it has no connection to Mr. Kiliszewski's support for the UAW.

During her opening statement at the hearing, counsel for the General Counsel asked the ALJ to discount what Mr. Kiliszewski did to Ms. Sanchez, suggesting that Mr. Kiliszewski's conduct was not altogether serious given the setting in which the comments occurred:

> You will hear testimony from other employees that the workplace is filled with cursing on a routine basis, even from this supervisor. This is no hospital or genteel setting. This is the shop floor of an automobile plant.

(Tr. v.1 at 15). The implication is all too clear: Mr. Kiliszewski was entitled to yell "fuck you, bitch" at a female production supervisor – and Ms. Sanchez is obligated to take it – because she worked in a manufacturing facility. But if the legal standards that are required by federal law and continue to evolve in our country are to have meaning and if Challenge's own employee

dignity policies continue to have meaning, the type of conduct to which Mr. Kiliszewski has admitted cannot be tolerated in the plant setting.

That is not say that every time an employee uses profanity in the workplace that the individual needs to be discharged. But when the employee uses profanity, is insubordinate, is disrespectful, causes a female supervisor to feel "afraid" and "intimidate[d]," and then fails to take any accountability, an employer is left with nary an option but to discharge the individual. Had Mr. O'Brien concluded that Mr. Kiliszewski's employment should have been continued as the ALJ would have Mr. O'Brien do, not only would it expose Challenge to potential legal liability for failing to remediate what it found to be unacceptable treatment of a female Hispanic employee, but it would also force Ms. Sanchez to continue to work in an uncomfortable environment in which she was fearful, with the knowledge that Mr. Kiliszewski had no intention to change his behavior. While the Counsel for the General Counsel can certainly point to cases in the past decades where the NLRB has recognized that shop talk was appropriate and that the industrial workplace is a rough and tumble place, in 2017 Challenge's attempts to reform conduct standards within its facility should be supported. But even if the ALJ or the Board did not deem Challenge's applications of its dignity policies in this case to be salutary, it should be uncontested that Challenge was entitled to take such an action, especially in the absence of any union animus motivating the discharge in whole or in part. Indeed, the Board has recognized that when employers take these types of actions, the employer has met is burden of establishing legitimate grounds for termination of employment. See also *Waste Management of Arizona, Inc.*, 345 NLRB 1339, 1341 (2005) (dismissing 8(a)(3) charge because "Respondent has shown that it would have taken the same action in the absence of protected conduct. [Charging Party] screamed profanities at [supervisor] in a crowded work area, and repeatedly refused to speak to

him in private, preferring to loudly curse at him in front of other employees. His conduct was insubordinate, it disrupted the workplace, and undermined [his supervisor's] supervisory authority").

2. **The ALJ overstepped his because his only authority was to determine if Challenge reasonably believed that Mr. Kiliszewski engaged in the conduct for which he was discharged.**

Like the ALJ in *Sutter Bay*, the ALJ here "fly-specs" Challenge's evaluation of the evidence (relying on evidence other than Mr. Kiliszewski's own admissions in his written statement) and "reaches factual conclusions as to what actually happened." *Sutter East Bay Hospitals v. NLRB,* 687 F.3d 424 (D.C. Cir. 2012). Where an employer's disciplinary action is based on employee misconduct (as it is in this case), "[a]n employer who holds a good-faith belief that an employee engaged in the misconduct in question has met its burden under *Wright Line.* This is true even if the employer is ultimately mistaken about whether the employee engaged in the misconduct. The good-faith belief demonstrates that the employer would have acted the same even absent the unlawful motive." *Sutter East Bay Hospitals v. NLRB,* 687 F.3d at 434 (D.C. Cir. 2012) (emphasis added). This is because "the *Wright Line* test does not concern itself with whether the employee actually engaged in the misconduct." *Id.,* at 435.

The similarity between the facts of the *Sutter Bay* case and the facts here, and the similarity between the misapplication of the Wright Line test in that case and the ALJ's reasoning in his recommended opinion here perfectly illustrates why the ALJ is wrong. In *Sutter Bay*, the employer discharged a primary union support and organizer (Griffith) after it received reports she engaged in a profane outburst around other employees after she was suspended. Multiple witnesses to the alleged tirade were interviewed, but many of the witness reports contradicted each other. Ultimately, the decision-making employer supervisor (Hatten) believed the statements of witnesses who said that the union supporter was profane, and the employee was

terminated. The ALJ in Sutter Bay compared the statements against each other and made credibility determinations based on the evidence, reaching conclusions about what he thought actually happened in the break room. But as the DC Circuit explained, this was irrelevant and constituted error in the application of Wright Line:

> Rather than applying the Wright Line test by examining Hatten's reasonable beliefs and how those beliefs might have informed his disciplinary decisions, the ALJ simply reached factual conclusions as to what actually happened. He found, for example, that Griffith did not use the word "f* * *" in the break room after being informed of her suspension on March 24. But Hatten, who was not present during the tirade, relied on reports from managers stating that Griffith did engage in the tirade, and on Griffith's own admission that she "might have" used that language. Whether the ALJ believes the reports are accurate or whether Griffith actually engaged in the tirade is largely immaterial to whether Hatten reasonably believed she did. The ALJ relied on his conclusion that the contemporaneous written reports were self-serving fabrications. Of course, if Hatten were properly found to be part of such a fabrication or to have knowledge of it, that would relate directly to his reasonable belief. But the ALJ made no analysis or finding that Hatten had any reason to doubt the veracity of the reports. Therefore, the proper question was whether Hatten, relying on those reports and Griffith's own admission, reasonably believed the tirade occurred.

Sutter East Bay Hospitals v. NLRB, 687 F.3d at 436 (D.C. Cir. 2012) (emphasis added).

Compare the D.C. Circuit's clarification of the "reasonable belief" standard with the reasoning of the ALJ in the recommended opinion in this case:

> Similarly, Compeau's investigation revealed mitigating factors with respect to Mr. Kiliszewski's conduct in directing profane language at a supervisor. Compeau interviewed five witnesses to the incident (in addition to Sanchez and Kiliszewski) and the statements of those witnesses suggest that Sanchez was the aggressor and was taking out frustration with her own second shift mechanics on Kiliszewski, a third shift mechanic who had just arrived at the facility and whose shift had not yet started. Witnesses reported that Kiliszewski had told Sanchez that he was not on the clock yet and would make the repairs once he started work, but that Sanchez repeatedly accosted him and, according to one [witness], was resisting Kiliszewski's efforts to disengage

> from the confrontation. Compeau discounted this evidence, claiming, incredibly, that there was nothing in the investigation indicating that Sanchez was the aggressor during the exchange. Instead of making a downward adjustment of the discipline based on Sanchez's part of provoking and prolonging the confrontation, Compeau did just the opposite – accelerating the progressive discipline for Kiliszewski's first infraction... all the way to discharge.

(Dec. at 18). In other words, the ALJ criticizes Challenge's investigation of the May 5 altercation between Ms. Sanchez and Mr. Kiliszewski by arguing that Challenge inappropriately evaluated the evidence gathered during the investigation, thus placing too much culpability on Mr. Kiliszewski's shoulders and delivering the "wrong" penalty. This is error – "[w]hether the ALJ believes the reports are accurate or whether [the charging party] actually engaged in the tirade is immaterial to whether [the employer] reasonably believed [he] did." *Sutter East Bay,* 687 F.3d at 436.

But the ALJ erred when instead of reviewing the correct question to decide this case – did Mr. O'Brien hold a reasonable, good faith belief that Mr. Kiliszewski's misconduct mandated termination? – he second-guessed the results of Challenge's investigation by criticizing the way that Mr. O'Brien and Ms. Compeau weighed the witness statements as compared to Ms. Sanchez and Mr. Kiliszewski's own testimony.[24] In essence, the ALJ held that Challenge failed to carry its *Wright Line* burden because he disagreed about the severity of what Mr. Kiliszewski had done. The ALJ erred in making this assessment.

Moreover, when reaching his factual conclusions, the ALJ exhibits inexplicable bias in support of the male accused, and heaps inexplicable skepticism on the female accuser.

[24] Even if the ALJ's role had been to second-guess what really happened on May 5 between Mr. Kiliszewski and Ms. Sanchez, the ALJ's opinion was also deficient in this regard. For one, many of the witness statements that (as the ALJ put it) "suggest Sanchez was the aggressor" deny that Mr. Kiliszewski swore – an admission Mr. Kiliszewski himself makes. Also, the ALJ barely mentions the contemporaneous statement of Mr. Napier, which was collected the day of the incident and which specifically corroborates Ms. Sanchez's story with respect to Mr. Kiliszewski's vile and misogynist final send-off missive.

For example, the ALJ summarizes the evidence by stating that "[t]he record establishes that the exchanges between Sanchez and Kiliszewski eventually became heated, with both participants raising their voices and speaking rudely to each other."[25] (Dec. at 4). The ALJ also attempts to defend Mr. Kiliszewski's conduct by noting (against the weight of the evidence[26]) that "employees were not supposed to enter onto the production floor prior to the start of their scheduled shifts," or by observing (as was refuted by the testimony[27]) that Ms. Sanchez "was not Kiliszewski's supervisor or even a supervisor on his shift." (Dec. at 4, fn. 4; 18). Accordingly, the ALJ oversteps his role and stretches the evidence to make conclusions about what actually happened. And, in doing this, the ALJ minimizes or defends Mr. Kiliszewski's treatment of Ms. Sanchez, and fails to account for the fact that Mr. Kiliszewski never took accountability for his admittedly poor behavior. This too is similar to *Sutter Bay,* where the D.C. Circuit held that the ALJ's opinion contained a "troubling aspect" because "[t]he employer's witnesses saw their testimony completely disregarded for the slightest of immaterial inconsistencies, while the [charging party's] witnesses survived even material contradictions." *Sutter East Bay,* at 437.

The ALJ also erred by judging Ms. Sanchez with a skeptical and critical eye for no evident or obvious reason. The ALJ baselessly concluded that Ms. Sanchez's statement and testimony was not "wholly free of bias" despite the fact that the recommended opinion identifies no conceivable reason she would lie about what happened on May 5, nor did either Mr.

[25] Again, this oversteps the ALJ's role. His role was to determine if the evidence supports Mr. O'Brien's reasonable belief in what Ms. Sanchez had reported. The obvious answer is yes.

[26] Maintenance Manager Jeff Glover testified that he would "expect" maintenance mechanics like Mr Kiliszewski "to work if they're on the production floor" when asked to fix a machine, even if the request came before the scheduled start of the employee's shift. (Tr. v.2 at 358). Challenge excepts to the ALJ's materially misleading description of this testimony (Dec. at 4, fn. 4). It is uncontested that before his altercation with Ms. Sanchez, Mr. Kiliszewski had walked onto the production floor and had even surveyed a potential problem with machine 55A, a unit which Challenge employee Joe Maynard allegedly told Mr. Kiliszewski was "the hottest thing in the shop." (Tr. v.1 at 36). By Mr. Kiliszewski's own testimony, he was ready, willing, able and in the process of doing some work before his shift was scheduled to start. But he wasn't willing to assist Ms. Sanchez

[27] Mr. Glover testified that production supervisors like Ms. Sanchez gave directions to fix machines to maintenance mechanics "on a daily basis," and explained that if a production operator instructed a mechanic to fix a machine, his "expectation is that they respond as quickly as they can to get the machine up and running." (Tr. v.2 at 358).

Kiliszewski or the General Counsel attempt to attribute any type of animus to her in raising her complaint. (Dec. at 5). The ALJ also decided to cast disbelief upon the accuser, holding that "Sanchez's testimony that Kiliszewski said 'fuck you bitch' is unreliable on its face," (Dec. at 5), and discounting her memory because of the "noisy plant environment." The ALJ's determination to find Ms. Sanchez less than credible without any meaningful explanation is all the more inexplicable considering that Ms. Sanchez gathered a contemporaneous witness statement from a nearby production operator, David Napier, who corroborated her testimony and affirmatively identified Mr. Kiliszewski as the person who shouted "fuck you, bitch" at Ms. Sanchez at the conclusion of their conflict. (R Ex 14; Tr. v.2 at 231-232). The ALJ's judgment to view Ms. Sanchez's testimony with a jaundiced eye is revealed by the record, and he erred when doing so. It was not his role to evaluate whether he thought Ms. Sanchez or Mr. Kiliszewski's account of the altercation was more accurate, or to determine whether Ms. Compeau should have believed the witnesses over Mr. Kiliszewski himself. Instead, the ALJ's sole role was to determine if Ms. Sanchez' testimony along with the other evidence submitted provided Challenge a reasonable belief to support the decision to discharge.

The ALJ was also disproportionately critical with the only other female witness who testified at the hearing: Darlene Compeau. Ms. Compeau explained that she believed Ms. Sanchez's complaint in part because of the way she herself had been treated by Mr. Kiliszewski during Ms. Compeau's interview with him – specifically, Ms. Compeau testified that she felt disrespected by Mr. Kiliszewski because he turned his back to her during the interview and only began answering questions when Mr. O'Brien arrived. (Tr. v.2 289-291). The ALJ's rejection of Ms. Compeau's feelings was inappropriately dismissive, and his analysis is facile:

> Compeau attempted to further her narrative about gender harassment by asserting that Kiliszewski, by not directly looking at

> or addressing her during the May 9 meeting, was treating her "the way he treated Norma [Sanchez] on May 5. However, Kiliszewski did not refuse to address Sanchez directly on May 5. To the contrary, the Respondent's explanation for discharging Kiliszewski relies on the fact that Kiliszewsi *did* directly address Sanchez. In a similar vein, Compeau, after asserting that Kiliszewski refused to address her on May 9, claimed that he yelled at her, just like he did at Sanchez. Compeau's claim that Kiliszewski yelled at her on May 9 is, of course, hard to square with her claim that he refused to even speak with her at the meeting. When pressed, Compeau conceded that Kiliszewski did not yell at her.

(Dec. at 8). Compeau's point was not that Mr. Kiliszewski treated her in the identical manner to the way he treated Ms. Sanchez – her point was that she could believe that perhaps Mr. Kiliszewsi had been demeaning to Ms. Sanchez on May 5 because he was "demeaning [Ms. Compeau]" on May 9. (Tr. v.2 at 290). This is hardly as incredible of an explanation as the ALJ portrays it to be.

D. The ALJ's other, miscellaneous reasons for determining that Challenge would not have terminated Mr. Kiliszewski but for his union support are flawed.

The ALJ ultimately concluded that Challenge did not meet its responsive burden under *Wright Line* for two other miscellaneous reasons,[28] each of which should be rejected:

1. The ALJ erred when he held that Mr. Kiliszewski's conduct should have subjected him to progressive discipline under Challenge's policies.

The ALJ's first reason for rejecting Challenge's legitimate, non-discriminatory reason for discharging Mr. Kiliszewski is based on his incomplete reading of Challenge's policies. In his recommended opinion, the ALJ concludes that the conduct Mr. Kiliszewski was

[28] The ALJ also references the fact that Mr. Mathews was not disciplined and that this somehow supports the ALJ's conclusion and finding of a Section 8(a)(3) violation. However, the reason is easily dismissed. Mr. Mathews was a known union supporter, as was Mr. Kiliszewski. (Tr. v.1 at 152-155). The obvious reason Mr. Mathews was not subject to discipline is because Ms. Sanchez did not complain about Mr. Mathews' conduct and did not indicate that he had been aggressive, profane, insubordinate and disrespectful towards her. If anything, the treatment of Mr. Mathews shows it was the facts that dictated Challenge's decision-making and that it was not out to get union supporters.

alleged to have engaged in should have been subjected to the progressive disciplinary policy (R Ex 4, at 18-19) as opposed to the portions of Challenge's Team Member Conduct policy which specify that "[c]ertain types of conduct are extremely serious and will typically lead to termination of employment." (R Ex 4, at 17). Specifically, the ALJ noted that "directing profane language at supervisors and insubordination... are dealt with through progressive discipline starting with a verbal warning for the first offense and only reaching discharge with the fourth such offense." (Dec. at 17, citing R Ex 4, at 18-19). In contrast, the ALJ held that "if Compeau could show that Kiliszewski had made such statements and that they rose to the level of 'serious and pervasive' harassment under the handbook (a big 'if'), then Compeau could arguably justify imposing discharge as the very first disciplinary action against Kiliszewski." (Dec. at 17). This, the ALJ concluded, was a stretch under the facts alleged. (*Id.*)

The ALJ's conclusion does not follow because no Challenge witness ever claimed that Mr. Kiliszewski was terminated for engaging in racial or sexual harassment[29] as that term is used under employment law. Instead, Mr. Kiliszewski's conduct violated the "employee dignity" provisions of Challenge's anti-harassment policy, which prohibits more just unlawful harassment. (R Ex 4, at 3; 17). As Ms. Compeau explained, this policy required Challenge's employees to "treat others how you would expect to be treated. You're not going to behave in a manner that is intimidating, is overbearing, is disrespectful." (Tr. v.2 at 283). Specifically, the policy reads in pertinent part as follows:

> **Team Member Dignity and Respect (No Harassment)**
>
> Challenge expects all of its team members to conduct themselves with dignity and with respect for fellow team members, customers, the public, and others...

[29] This must have been the ALJ's assumption, given the ALJ's skeptical reference – "a big if" – about whether Mr. Kiliszewski's behavior was severe or pervasive on May 5. (Dec. at 17).

(R Ex 4, at 3). Under the terms of the Handbook, violation of the Team Member Dignity Policy is classified as "Major/Serious Offenses Resulting in Immediate Termination," contrary to the conclusion of the ALJ. (R Ex 4, at 17).

Mr. O'Brien, the person who ultimately decided to terminate Mr. Kiliszewski's employment, confirmed that his decision was based on more than just insubordination or profanity – indeed, it was based in part on the dignity policy:

> Profanity is a piece of the puzzle or the equation. But the bigger piece of it is really the interaction, and that's the disrespect, that is the dignity, that is the harassment that's there. And those pieces – the profanity only adds color and flavor to it but – and it's an important piece of it, because again that's not how – that's not how we can respond to each other in today's work environment. It's not acceptable. So it adds to it, but there's beyond the profanity. The main gist of [the decision is] the dignity, respect, and harassment, and not following that direction or that request made.

(Tr. v.2 at 404). But not only does Challenge's employee dignity policy require that Mr. Kiliszewski's employment be terminated, federal employment laws require employers to take appropriate remedial action when it concludes an investigation. As quoted above, Mr. O'Brien concluded that Ms. Sanchez, a female Hispanic employee, had made the complaint because she was made to feel uncomfortable, afraid, and disrespected in the workplace by a white male employee. Mr. Kiliszewski, the identified aggressor, did not use the investigation to reflect in any attempt to gain an understanding about his behavior, or the impact his behavior had on other people in the workplace, or how he could improve his behavior such that having him return to the workplace would be an appropriate remedial step. Challenge considered the factors that the EEOC would have all employers consider when determining what constitutes an appropriate remedial action, and concluded under the circumstances that discharge was appropriate. The ALJ's misstatement of Challenge's policies and his failure to account for what the law expects of

employers is another example of the lengths to which the ALJ had to go in an effort to find that Challenge engaged in unlawful conduct.

2. **The ALJ erred when he considered other examples of discipline Challenge has assessed, all of which are irrelevant for several reasons.**

The ALJ also felt that evidence of "discipline imposed on other employees:"

> ...does nothing to advance the Respondent's efforts to meet its responsive burden of showing that it would have discharged Kiliszewski even if its animosity towards his protected activity had not been a motivating factor. To the contrary, the record shows that employees who the Respondent disciplined for first offenses of directing profanity at supervisors and co-workers or for refusing to perform work had almost always received verbal warnings or lesser discipline... No such opportunity was afforded to Kiliszewski.

(Dec. at 18). The ALJ's unstated (and baseless) inference is that but for Mr. Kiliszewski's union activity, he would not have been terminated, just like the other employees with discipline entered into the record were not. But analysis of these other disciplined employees compares apples to oranges. For one, there is no evidence any of the employees discussed in the record were "similarly situated" to Mr. Kiliszewski. As the Sixth Circuit has held:

> [I]n the context of cases alleging differential disciplinary action, to be deemed similarly-situated, the individuals with whom the plaintiff seeks to compare his/her treatment must have [1] dealt with the same supervisor, [2] have been subjected to the same standards, and [3] have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Jackson v. VHS Detroit Receiving Hosp., Inc., 814 F.3d 769, 777 (6th Cir. 2016). All of the employees discussed in the comparable disciplinary evidence work for different supervisors than Mr. Kiliszewski, do different jobs from Mr. Kiliszewski, or both.

In this case, to constitute a similarly-situated employee, the following facts would have to exist to make those lesser disciplines relevant:

- The complaining party was a minority and a female. (Tr. v.2 at 296).
- The complaining party established that she was afraid and made to feel "intimidate[d]" in the workplace. (Tr. v.2 at 225; R Ex 8).
- The complaining party was an employee at Challenge for over 4 years, and had never raised any prior complaints against any other employee. (Tr. v.2 at 217; Tr. v.2 at 372; 388).
- The complaining party had gained the trust of management based on her work performance. (Tr. v.2 at 400).
- The complaining party complained that she had been subjected to aggressive, profane, insubordinate and disrespectful conduct, and submitted supporting evidence to prove it. (R Ex 8; Tr. v.2 at 226).
- That the person who was alleged to have been engaged in the wrongful conduct would take no responsibility or accountability and left the employer with the distinct impression that the conduct would be repeated in similar circumstances. (Tr. v.2 at 365-366; 397).

This is consistent with Mr. O'Brien's testimony during the hearing:

> Q: You talked about profanity. There has been introduced into evidence [10 or 15] disciplines for employees who have engaged in profanity where they received written warnings... And the obvious question is, well, what's the difference here? Why does [Mr. Kiliszewski] – why is he being fired for this interaction if it's about profanity when these other people have a written warning?
>
> A: Profanity is a piece of the puzzle or the equation. But the bigger piece of it is really the interaction and that's the disrespect, that's the dignity, that is the harassment that's there. And those pieces – the profanity only adds color and flavor to it[.] It's an important piece of it, because again that's not how – that's not how we can respond to each other in today's work environment. It's not acceptable. So it adds to it, but there's beyond profanity. The

> main gist of it's the dignity, respect, and harassment, and not following that direction or request made.

(Tr. v.2 at 403-404). The ALJ's analysis and the record is devoid of any evidence that would be able to demonstrate that the disciplines introduced by either the General Counsel or by Challenge present similarly situated employees.[30] (GC Ex 19; R Ex 47-50).

Additionally, the ALJ erred in holding that any other employee engaged in "the same conduct, without such differentiating or mitigating circumstances that would distinguish their conduct" sufficiently to articulate a disparate treatment theory. The record is full of testimony demonstrating that the conflict between Mr. Kiliszewski and Ms. Sanchez was unique in terms of its severity. Mr. Mathews testified that the interaction was "unusual," and "not something that commonly happens" at Challenge. (Tr. v.1 at 175). Production Operator Willie Mae Walton testified that the event was "nothing something I commonly seen, no," and claimed that she had never seen anything like the interaction between Mr. Kiliszewski and Ms. Sanchez on May 5 before during her tenure. (Tr. v.1 at 195). Ms. Sanchez testified that she had never been "cussed out like that before at Challenge." (Tr. v.2 at 226). Ms. Compeau, upon reading Ms. Sanchez's email, stated that she was "shocked" by "the nature of the aggression that was used and the verbal nature, the refusal to do the work, the whole context of it." (Tr. v.2 at 285). Ron Mapes testified that if he had ever heard a maintenance person call a production employee a "bitch" he would "immediately ask for statements" and claimed he had "never received anything of the kind." (Tr. v.2 at 381). Mr. O'Brien testified that the conduct Ms. Sanchez described was "not how normal people interact with each other." (Tr. v.2 at 389). The manner in which

[30] That being said, the example of prior discipline that is closest with respect to the six materially relevant factors from Mr Kiliszewski's discharge was an example of the discharge of an employee named Brad Lyons. (R Ex 50). Mr. Lyons was terminated by Challenge by refusing to work additional hours to help catch up on production. When he refused his supervisors' instructions to work, he was rude and loud in his refusal to work. Two of Mr. Lyons' supervisors were Hispanic males, neither of whom affirmatively complained or alleged that Mr. Lyons' conduct frightened or intimidated them. Mr. Lyons refused to admit to using profanity during Challenge's investigation.

Challenge responded to dissimilar employee conduct issues has no bearing on how it "should" have treated Mr. Kiliszewski, and the ALJ erred in concluding otherwise. Thus, because the conflict between Mr. Kiliszewski and Ms. Sanchez was exceptional as described in the testimony of nearly every witness, evidence submitted regarding disciplines issued to other employees has no bearing on the discipline Challenge imposed on Mr. Kiliszewski.

E. The ALJ erred in failing to grant Challenge's Motion to Dismiss made at the conclusion of the General Counsel's case-in-chief.

Based solely on Ms. Sanchez's email (R Ex 8); Mr. Kiliszewski's documented, written response entered into evidence (GC Ex 3); and Mr. Kiliszewski's own testimony corroborating in relevant part Ms. Sanchez's weighty and serious complaints, Challenge moved the ALJ to dismiss Mr. Kiliszewski's 8(a)(3) charge after the General Counsel rested. Challenge's argument was as simple as this: in 2018, if a female supervisor formally complains that the employee was egregiously and publicly disrespectful to her, undermined her authority during altercation, made her feel "intimidated" and "afraid;" and if the male employee admits that the conflict occurred in relevant part exactly as described without expressing any remorse or willingness to change; then Challenge cannot continue to employer that male employee. Said differently, Challenge moved to dismiss at the completion of the General Counsel's case-in-chief because it had already established that no employee would have been retained after behaving as Mr. Kiliszewski admitted he had on May 5, 2017, even absent his support for the UAW. As excerpted in relevant part,[31] Challenge argued:

> We sit here in 2018, and in 2018 we've learned as a country -- in some not small part with the #MeToo movement to make us all aware – that women in our society too often feel marginalized in the workplace. They feel marginalized because of intimidation,

[31] To the extent that the record directly supports statements made by Challenge's counsel during his oral motion at the hearing as excerpted in the block quote below, footnotes direct attention to supporting testimony or documentation.

because of harassment, because of feeling bullied. Yet the number of women that report they feel that way, not many of them report it to their employers. The EEOC has done studies on this. The EEOC has reported that one of the primary reasons that women do not report is because they feel nothing will be done. They feel nothing will be done because they will become the victim. They would become the victim of the investigation. It will be because of something they do that [will] get turned around on them, and so they will not report those allegations...

And so it's in this context that Challenge gets [Ms. Sanchez's] complaint... What was the complaint that Ms. Sanchez made? Ms. Sanchez made a complaint that she felt intimidated.[32] She felt afraid.[33] She wanted it to stop.[34] And she said why? She said it's because I had a man, when I asked him to do work, I'm a supervisor, he yelled at me and he cursed at me,[35] I came back and asked him to do it, at which time he told me to get the fuck away from me, get the fuck out of his face, and fuck you, bitch.[36]

What did Mr. Kiliszewski say he did? Mr. Kiliszewski said... [s]he had asked first.[37] He said no.[38] She came back around, according to his testimony yesterday and according to [GC Ex 3], and at this point in time, according to Mr. Kiliszewski, because she's demanding that he go work on this machine, he says now she's pushing the limits...[39] He feels harassed and hostile because a woman comes up to him and demands that he go do his job.[40]

[...H]e yelled at her, "Where is your fucking second shift maintenance guy?"[41] He doesn't dispute that...[42] And again, according to him, Norma again... demands it. So then he said to

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[32] Q How did that make you feel? Ms Sanchez Really bad, like really bad because I was just trying to do my job (Tr v 2 at 226).

[33] Ms Sanchez testified that Mr Kiliszewski made her "feel scared" during their encounter (Tr v 2 at 225).

[34] Ms Sanchez I didn't want it to happen again. That's why I decided to write this statement. (Tr v 2 at 219-220)

[35] Mr Kiliszewski had "never cuss[ed her] out before, only that day" (Tr v 2 at 225-226)

[36] Also see Ms Sanchez's testimony, which matched her written statement (R Ex 8) precisely (Tr v 2 at 218-219).

[37] Mr Kiliszewski admitted to this in his hearing testimony (Tr. v 1 at 35).

[38] *Id*

[39] (GC Ex 3, at Paragraph 5)

[40] Q And you say in response "Now she's pushing the limits. She's heading into a hostile work environment and harassment situation" Those are your words, correct?

A Yes

Q And she's doing that because she came up to you and she's demanding that you go work on [machine] 79, correct?

A Yes (Tr v 1 at 76-77)

[41] Mr Kiliszewski testified to this during direct examination by the General Counsel (Tr v 1 at 36-37)

[42] Mr Kiliszewski admitted to this in his hearing testimony. (Tr. v.1 at 77)

her[,] he said I explained to her, quote: "We don't take orders from you, only requests..."[43]

And then... what does he do next?[44] He tells her to "Get the hell away from me and don't bother us."[45] And how does he explain that? He justifies it, he did yesterday on the stand,[46] he does it in his statement,[47] he says that because her conduct is unprofessional and disrespectful because she demanded him to go do his job[.]

And lest there be any misunderstanding of what he means, he in paragraph 12 of his statement... makes clear how she could have avoided this[48]... "Respect isn't given, it's earned..."[49]

Now look what happened yesterday at the hearing? We've spun this now to make it Ms. Sanchez's fault.[50] Well, Ms. Sanchez asked for it.[51] Ms. Sanchez raised her voice.[52] Ms. Sanchez pointed her fingers.[53] Ms. Sanchez supposedly has these other events where she may have got angry with other people in the workplace.[54]

[...A]ccording to the General Counsel's case... the Employer should do nothing with these findings of fact. They say... [w]e have evidence so far in the record that he was targeted... It's not true... but even if that's true, we all know under *Wright Line* we then pivot to [whether] this event... is this the type of event that warrants discharge even if there is union animus, even

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[43] Mr. Kiliszewski admitted to this in his hearing testimony. (GC Ex 3, at Paragraph 8); (Tr. v.1 at 78).

[44] Mr. Kiliszewski admitted that when Ms. Sanchez returned to direct him to fix the machine again, his "blood was boiling." (Tr v.1 at 37)

[45] Q. You told a supervisor to get the hell away from you because she demanded that you go fix a machine that she believed was down. Correct?

A: Correct. (Tr. v.1 at 79)

[46] Q: [T]hat inexperience and that unprofessionalism, that disrespect came out because she's demanding that you go work on a machine that you don't think you need to work on right now, correct?

A. Correct. (Tr v.1 at 79).

[47] (GC Ex 3, at Paragraph 9).

[48] Q: And she's not respecting you because of the way she's talking to you, because she's demanding that you do this, she's not requesting that you do this work. And you find that to be disrespectful and unprofessional, right?

A: Yes. (Tr. v.1 at 83).

[49] (GC Ex. 12).

[50] The ALJ's recommended opinion concluded that "Compeau testified, accurately I find, that during the May 9 meeting, Kiliszewski took the position that the heated and rude character of the May 5 interaction between Sanchez and himself was Sanchez's fault, not his own." (Dec. at 7).

[51] Mr. Kiliszewski: "So I come back, poured a cup of coffee, here comes Norma. Now she's screaming, and she hollers at me, 'Mike, I told you I need this machine to run and you need to get over there and fix it now.' I says, 'No, I'm not on the damn clock.'" (Tr. v.1 at 37).

[52] Mr. Kiliszewski defended his conduct by accusing Ms Sanchez of this during his testimony. (Tr v.1 at 35).

[53] (Tr. v.1 at 158)

[54] Mr. Kiliszewski defended his conduct by accusing Ms. Sanchez of this during his testimony. (Tr. v.1 at 39)

> independently is this what the Employer would do? The answer is of course it is. And of course it should be.

(Tr. v.2 at 210).

In denying Challenge's Motion to Dismiss, the ALJ stated in totality:

> Thank you, Mr. Buday. The motion is denied. You recognized that as you did in the beginning of your talk how extraordinary it is. And I'll be honest with you, I've never done it. So thank you.

(Tr. v.2 at 214-215). The ALJ erred in denying Challenge's motion for summary judgment, and the record provides absolutely no justification or reasoning for why he reached this denial.

This error is significant because, to the extent that the Board agrees that the Motion should have been granted, this prohibits consideration of any evidence submitted by the Respondent during Challenge's case-in-chief or by the General Counsel on rebuttal. Accordingly, this would exempt the following evidence from being considered on appeal because it was submitted after Challenge moved the ALJ to dismiss the case:

- The testimony of Ms. Compeau, including (but not limited to) her description of the General Counsel's purportedly comparable employee disciplines (GC Ex 21; 25), and her allegedly "unusual level of animosity" which the supported the ALJ's finding of union animus;
- The rebuttal testimony of Mr. Kiliszewski; and
- Evidence concerning Challenge's response to discovering that organizational activity was occurring at the Holland facility, which the ALJ regarded as an "aggressive" reaction, and which supported the ALJ's finding of union animus.

III. THE ALJ ERRED WHEN HE DETERMINED THAT MR. LEADINGHAM'S COMMENTS TO MR. KILISZEWSKI VIOLATED SECTION 8(A)(1) OF THE ACT.

In his recommended order, the ALJ determined that Challenge violated Section 8(a)(1) of the Act when Mr. Leadingham issued his warning to Mr. Kiliszewski to "watch his back because managers were after him because of his union activity." (Dec. at 14). This misstates the record, and contorts Mr. Leadingham's own testimony. During direct examination, Mr. Leadingham admitted that he told Mr. Kiliszewski to "watch his back" during a telephone call sometime after April 25, 2017. But he explained that he told Mr. Kiliszewsi to watch his back "because supervisors or managers were watching him and others to see their union activity." (Tr. v.1 at 137). This is materially different and distinct from the ALJ's assertion that Mr. Leadingham told Mr. Kiliszewsi to watch his back "because managers were <u>after him because of his union activity</u>." (Dec. at 14) (emphasis added). The ALJ's conclusion places an inappropriate gloss on Mr. Leadingham's testimony, and it is this unexpressed gloss which, had it been conveyed, might have violated Section 8(a)(1).

Further, during cross examination, Mr. Leadingham backtracked slightly:

> Q: You indicate that Mr. Ritter told you that Mike should watch his back. Did I get that correct?
>
> A: No, he told me not to talk to him because he –
>
> Q: Okay. Mr. Ritter told you not –
>
> A: To avoid him.
>
> Q: To avoid Mike?
>
> A: That he was being watched.
>
> Q: That's what you remember him telling you?
>
> A: Yes.
>
> Q: Anything else that he told you about Mike that's relevant?

A: Not that I can remember, no.

(Tr. v.1 at 145-146) (emphasis added). Accordingly, Mr. Leadingham explained that he told Mr. Kiliszewski that Challenge was watching him, and expressed the opinion that he should "watch his back." There is no evidence that he told Mr. Kiliszewski that the employer was out to get him.

Board law permits employers to engage in surveillance of protected activities if the employer is motivated by a lawful, legitimate purpose (as opposed to being motivated by an intent to discourage membership in a labor union). *See, e.g., Horsehead Resource Development Co., Inc. v. NLRB,* 154 F.3d 328, 340 (6th Cir. 1998) (permitting employers to surveil picket line activity to avoid violence). In this case, Challenge's asserted and lawful reason for engaging in monitoring UAW organizing efforts during April of 2017 – namely, that Challenge was monitoring compliance with the neutrality agreement because it suspected that the UAW was in breach. This does not violate Section 8(1)(a) because it implies no threat to Mr. Kiliszewski, nor would it reasonably tend to interfere with his own personal protected activity.

CONCLUSION

The ALJ's proposed decision and proposed remedy to reinstate Mr. Kiliszewski is completely inappropriate based on the facts. The evidence is overwhelming – Challenge never did anything to discourage membership in the UAW after 2016, thus undermining any plausible finding of union animus in this case as a matter of fact and law. Further, Challenge would have terminated any employee if they had been the subject of an emailed complaint like the one Ms. Sanchez sent, and if the employee neither denied engaging in the conduct nor showed any remorse for it. The ALJ's recommended order ignores key evidence and comes to the wrong conclusion. The Board should reject it and should dismiss Mr. Kiliszewski's 8(a)(1) and 8(a)(3) charges in full and with prejudice.

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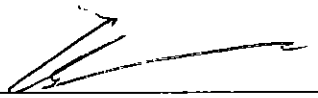
By: 

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